

***United States Court of Appeals
for the Second Circuit***



APPENDIX

76-1284

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 76-1284

UNITED STATES OF AMERICA,

Appellant,

—v.—

SYLVIO J. GRASSO,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

APPENDIX FOR THE APPELLANT

PETER C. DORSEY
United States Attorney
District of Connecticut
270 Orange Street
New Haven CT 06510



MICHAEL HARTMERE
Assistant United States Attorney
District of Connecticut
270 Orange Street
New Haven CT 06510

PAGINATION AS IN ORIGINAL COPY

INDEX TO APPENDIX

	PAGE
Docket Entries	A-1
Indictment	A-6
Ruling On Defendant's Motion To Dismiss	A-9
Proceedings Of November 26, 1975	A-22
Transcript Of Tape Recording, Court Exhibit G	A-32
Defendant's Memorandum In Support Of Dis- missal Of Indictment On Grounds Of Double Jeopardy	A-78
Government's Memorandum In Opposition To De- fendant's Motion To Dismiss Indictment On Grounds Of Double Jeopardy	A-88
Reply Memorandum In Support Of Defendant's Motion To Dismiss Indictment On Grounds Of Double Jeopardy	A-96
Government's Supplemental Memorandum In Op- position To Defendant's Motion To Dismiss Indictment On Grounds Of Double Jeopardy	A-102
Supplemental Reply Memorandum In Support Of Dismissal Of Indictment On Grounds Of Double Jeopardy And Affidavit of Henry B. Rothblatt	A-108

T. EDNET CLARIE
KCL

И 75 / 52 .

TITLE OF CASE

ATTORNEYS

For U. S.:

Peter C. Dorsey, US Attorney
Michael Hartmere, Asst USAtty.
450 Main St., Hartford, Conn.
David H. Beitz, Dept. of Just
10th and Penna. Ave., N.W.
Washington, D.C.

For Defendant: ph (212)
Henry Rothblatt 787-7631
232 West End Ave.
New York, New York 10073
Frank S. Berall
60 Washington Street
Hartford, Conn. 06106
ph - 249-5261

DATE 1975

PROCEEDINGS

4/16	The Grand Jury at Hartford, returned a True Bill of Indictment charging violation of 26 USC 7201 in 3 counts - income tax evasion. Summons to issue. (Clarie, J.)
4/18	Summons issued in duplicate and with certified copy of the indictment handed US Marshal for service.
4/28	Appearance of Henry Rothblatt entered and filed to represent the defendant. Local counsel to be Donald Cardwell. PLEA of not guilty to 1 count indictment entered. Motions to be filed by May 27th and (Clarie, J.) to respond by June 3rd. (Clarie, J.)
5/7	Appearance of Henry B. Rothblatt entered and filed to represent the defendant.
5/1	Marshal's exonerated return, filed. (Summons)
5/16	Appearance of Frank S. Berall entered and filed to represent the defendant.
5/20	Compliance With Standing Order of Court Regarding Discovery, filed by Attys. Hartmann and Rothblatt.
5/27	Motion For Discovery and Inspection and Demand for A Bill of Particulars, filed.

CONTINUED

A-1.

DATE 1975	PROCEEDINGS
5/21	Appearance of M. Donald Cardwell entered and filed to represent the defendant.
6/3	Appearance of David H. Beitz entered and filed to represent the United States of America.
6/3	Government's Response To Defendant's Motion For Discovery and Inspection of Evidence and Alternative Motion For Discovery by Government and Government's Response To Defendant's Motion For Bill of Particulars, filed.
6/5	Memorandum in Support of Government's Response To Defendant's Motion For A Bill of Particulars, filed.
6/9	Hearing on Motion For Discovery etc. - Memorandum in Support of Defendant's Motion for Discovery and Inspection and Demand for Bill of Particulars, filed. - Decision Reserved. (Clarie, J.)
8/13	Stipulation Re Discovery, filed by parties.
8/20	Court Reporter's Notes of Proceedings held on April 28, 1975, filed in Hartford. (Sperber, R.)
8/26	Compliance with Standing Order of Court Regarding Discovery (II), filed by parties.
"	Authenticity Stipulation No. 1, filed by parties.
8/20	Court Reporter's Notes of Proceedings held on June 9, 1975, filed in Hartford. (Sperber, R.)
9/8	Court Reporter's Sound Recording of Proceedings held on April 28 1975, filed in Hartford. (Sperber, R.)
9/19	NOTICE OF READINESS ^o FILED BY THE Govt.
9/22	Over to Next Jury Calendar - (11/4/75) 2nd case. (Clarie, J.)
10/28	Authenticity Stipulation No 2, filed by parties.
"	Authenticity Stipulation No. 3, filed by parties.
11/3	Application for Writ of Habeas Corpus Ad Testificandum and Order filed. (Clarie, J.) m-11/6/75.
11/4	Assignment List Cal. Call - Ready. (Clarie, J.)
11/5	JURY TRIAL - Panel sworn on Voir Dire and interrogated by Court - 12 Jurors and 2 Alternates sworn and impanelled. Cast to commence today or tomorrow. (Clarie, J.)
11/6	JURY TRIAL COMMENCES: 14 Jurors report - Govt. Instructions on Charge - Govt. Filed Exhibit list and List of Witnesses - Attys. Beitz and Rothblatt give an opening statement- Exhibits filed as per shown on Courtroom minutes - 10 Govt. Witnesses, sworn and testified. Court adjourned at 5:02pm. (Clarie, J.)
11/7	JURY TRIAL CONTINUES: Jury of 14 report - Motion to Suppress is Denied - Witness previously sworn, recalled and testified - 15 Govt. Witnesses, sworn and testified. Govt. Exhibits filed as per shown on Courtroom minutes. (Clarie, J.)
11/11	JURY TRIAL CONTINUES: 14 Jurors report - Defendants Proposed Jury Instructions, filed - 2 Govt. witnesses, previously sworn recalled and testified - 9 Govt. Witnesses sworn and testified - Govt. Exhibits Filed as per shown on Courtroom minutes. Court adjourned at 5:00pm. (Clarie, J.)
11/12	JURY TRIAL CONTINUES: 14 Jurors report - Testimony of Daniel Harris, filed - Govt. Witness, previously sworn recalled and testified - 1 Govt. Witness sworn and testified - Court exhibit A, filed and Ordered Sealed - Court Exhibit A returned to Atty. Hartmere and unsealed - Defendant's exhibits 53, 54 & 219, filed. Court adjourned at 5:00pm. (Clarie, J.) Govt. exhibits as per shown on Courtroom minutes, filed. (Clarie, J.)

CONTINUED ON PAGE 2

DATE 1975	PROCEEDINGS
11/13	JURY TRIAL CONTINUES: 14 Jurors report - Govt. Witness, previously sworn, recalled and testified - 1 Govt. Witness sworn and testified - Govt. exhibits as per shown on Courtroom minutes, filed - Court exhibit B, filed - Deft's exhibits 5 & 6, filed. Court adjourned at 4:55pm until tomorrow morning at 10:15pm. (Clarie, J.)
11/13	CJA 20 executed (Templeton, D.C.) appointing Courtney B. Bourns to represent Daniel Harris, Material Witness.
11/14	JURY TRIAL CONTINUES: Jury of 14 report - Supplemental Requests to Charge filed by Atty. Hartmore - Court exhibit C, filed - Govt. exhibit 221, marked for identification then made full exhibit - 1 Govt. witness sworn and testified - Govt. rests at 3:13pm - Deft's exhibit 55, filed - 5 Deft's. Witnesses, sworn and testified - Court adjourned at 4:47pm. (Clarie, J.)
11/18	JURY TRIAL CONTINUES: 14 Jurors report - Witness sworn and testified - Defendant sworn and testified - Defendant's exhibits as per shown on Courtroom minutes, filed. Court adjourned at 5:00pm. (Clarie, J.)
11/19	JURY TRIAL CONTINUES: 14 Jurors report. Deft. Grasso, previously sworn, resumed the stand and continued testimony. - Witness previously sworn, recalled and testified - Govt. exh. 227, filed - Court exhibits D & E, filed - Defendant's exhibits as per shown on Courtroom minutes, filed. Court adjourned at 5:04pm until tomorrow at 10:00am. (Clarie, J.)
11/20	JURY TRIAL CONTINUES: 14 Jurors report - Witness previously sworn, recalled and testified - 2 Defendant's witnesses sworn and testified - Defendant's exhibits as per shown on Courtroom minutes, filed - Defense rests at 3:24p.m. - Govt. exhibits as per shown on Courtroom minutes, filed - Defendant's Attorney move that Government turn over all information that is exculpatory be turned over to Defendant - 3 Govt. witnesses sworn and testified - Atty. Rothblatt moves for Directed Verdict - Motion denied. Court adjourned at 5:00pm until tomorrow at 1:00pm. (Clarie, J.)
11/21	JURY TRIAL CONTINUES: 14 Jurors report- Jury dismissed at 1:00pm as testimony out of presence of jury will consume the day - Court appoints Charles Sturtevant as Attorney for Daniel Harris - Defendant's witness, sworn and testified - Court exhibits H & I, filed. 3 Court Witnesses, sworn and testified - Court exhibit A now marked, Grand Jury testimony of Harris is A-1, Interview of Harris is A-2 - Court adjourned at 5:05pm until Tuesday at 10:00am. (Clarie, J.)
11/24	Court Reporter's Transcript of Tape Recording, Court exhibit "G" filed. (Sperber, R.)
11/19	CJA 20 executed (Clarie, J.) and mailed to A.O. for payment. (Courtney B. Bourns)
11/25	JURY TRIAL CONTINUES: Hearing within trial continues. Court Exhibits J through M, filed. Witness previously sworn, resumes stand and testifies. Five (5) Defendants witnesses sworn and testified. Two (2) witnesses previously sworn recalled to stand and testify. Court Exhibit K now separated and the 3 pages are marked K-1, K-2 and K-3. Jury of 14 called to Courtroom at 5:00 p.m.--they reported at 2:00 p.m. --and excused until tomorrow at 10:00 a.m. Court adjourned at 5:03 p.m. until tomorrow at 10:00 a.m. (Clarie, J.)
11/26	JURY TRIAL CONTINUES: 14 jurors report. Hearing continues and both attorneys argue. Atty. Rothblatt moves for dismissal of case based on evidence or directed verdict of acquittal. Motion to Dismiss--DENIED. Court declares a mistrial. Jury reports to Courtroom and is OVER.

USA v.
H-75-52 - Sylvia J. Grasso

DATE	PROCEEDINGS
11/26	(contd) informed by Court as to results of hearing. Jury dismissed. Court adjourned at 10:35 p.m. (Clarie, J.)
12/1	Court reporter's transcript of proceedings held on November 26, 1975, filed in Hartford. (Sperber, R.)
12/8	Notice of Readiness, filed by Govt.
12/23	Court Reporter's transcripts (4 Vols.) of proceedings held on November 6, 7, 18 & 19, & 19, 1975, filed in Hartford.
12/29	Receipt for all Defendant's Exhibits signed by Sylvio Grasso, filed.
12/15/1976	Receipt signed by M. Hartmere for all Govt. exhibits, filed.
1/5	Court Reporter's transcript of proceedings held on November 20, 1975, filed in Hartford. (Collard, R.)
12/11/75	Govt's Motion For Release of Evidence with Order thereon, filed. (Clarie, J.) m-1/8/76 Endorsement entered by Judge granting Motion, "as to all exhibits except "Court Exhibits" which shall be retained in the custody of the Clerk" Copies sent to Attys. Hartmere and Cardwell.
1/6	Jury Assig. Cal. Call - Counsel to meet in chambers with the court to ascertain trial date. (Zampano, J.)
1/7	Motion To Withdraw as Attorney For Defendant and Memorandum in Support of Dismissal of Indictment On Ground of Double Jeopardy, filed.
1/15	Waiver of Right to Prompt Disposition of Criminal Case, filed by Government.
1/15	Memorandum in Opposition to Defendant's Motion to Dismiss Indictment On Grounds of Double Jeopardy, filed by Government.
1/16	Affidavit of William F. Dow, III, Asst. U. S. Atty., filed.
1/26	Court Reporter's Transcript of Testimony in the absence of the Jury on November 21 and 25, 1975, filed. Sperber, R. sent to R.C.
1/28	Reply Memorandum in Support of Deft's Motion to Dismiss Indictment on Grounds of Double Jeopardy, filed with attachment, by deft.
1/28	Court Reporter's Transcript of Proceedings held on November 12, 1975 (Excerpt of Bench Conference and Testimony of Daniel H. Harris, Jr.), filed. (Sperber, R.)
12/2/75	Marshal's return showing service, filed: Habeas Corpus
11/18/75	Marshal's return showing service, filed: Writ of H.C. ad Testificandum.
1976	
1/14	Marshal's non est return, filed: Subpoena to testify.
2/2	Hearing on Motion to Dismiss over to Feb. 11, 1976 at 11:30 A.M. Zampano, J. m-2/2/76
2/11	Hearing held on Deft.'s Motion to Dismiss. Decision reserved. Zampano, J. m-2/11/76.
2/17	Court Reporter's Notes of Proceedings held on 2/11/76, filed. (Hearing on Motion to Dismiss) Russell, R.
2/24	Govt's Supplemental Memorandum In Opposition to Deft's Motion to Dismiss Indictment on Grounds of Double Jeopardy, filed.
3/31	Court Reporter's Notes of Proceedings (call o' cal. war and jury selection) held on Nov. 4th and 5th, 1975, filed in Hartford, Sperber, R.
4/20	Court Reporter Notes of Proceedings held from Nov. 5, 1975 to Nov. 26, 1975, filed. Sperber, R. (10 packages)
" "	Court Reporter's Notes of Proceedings held on Nov. 20, 1975, filed (1 package)

A-4.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA :

v. :

CRIMINAL NO. *H-75-52*

SYLVIO J. GRASSO :

INDICTMENT

The Grand Jury charges:

COUNT ONE

That on or about the 17th day of April, 1970, in the District of Connecticut, SYLVIO J. GRASSO, a resident of Hartford, Connecticut, who during the calendar year of 1969 was married, did wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him and his wife to the United States of America for the calendar year 1969, by preparing and causing to be prepared, by signing and causing to be signed, and by mailing and causing to be mailed, in the District of Connecticut a false and fraudulent income tax return on behalf of himself and his said wife, which was filed with the Internal Revenue Service, wherein it was stated that their taxable income for the said calendar year was the sum of \$45,661.00 and that the amount of tax due and owing thereon was the sum of \$9,032.00, whereas, as he then and there well knew, their joint taxable income for the said calendar year was the sum of \$61,125.63, upon which said taxable income there was owing to the United States of America an income tax of \$12,806.33, in violation of Section 7201, Internal Revenue Code; 26 U.S.C., Section 7201.

COUNT TWO

That on or about the 6th day of April, 1971, in the District of Connecticut, SYLVIO J. GRASSO, a resident of Hartford, Connecticut, who during the calendar year 1970 was married, did wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him and his wife to the United States of America for the calendar year 1970, by preparing and causing

A-6.

to be prepared, by signing and causing to be signed, and by mailing and causing to be mailed, in the District of Connecticut a false and fraudulent income tax return on behalf of himself and his said wife, which was filed with the Internal Revenue Service, wherein it was stated that their taxable income for said calendar year was the sum of \$55,350.00 and that the amount of tax due and owing thereon was the sum of \$14,992.00 whereas, as he then and there well knew, their joint taxable income for the said calendar year was the sum of \$66,157.17, upon which said taxable income there was owing to the United States of America an income tax of \$20,197.23, in violation of Section 7201, Internal Revenue Code; 26 U.S.C., Section 7201.

COUNT THREE

That on or about the 12th day of April, 1972, in the District of Connecticut, SYLVIO J. GRASSO, a resident of Hartford, Connecticut, who during the calendar year 1971 was married, did willfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him and his wife to the United States of America for the calendar year 1971, by preparing and causing to be prepared, by signing and causing to be signed, and by mailing and causing to be mailed, in the District of Connecticut a false and fraudulent income tax return on behalf of himself and his said wife, which was filed with the Internal Revenue Service, wherein it was stated that their taxable income for said calendar year was the sum of \$16,646.00 and that the amount of tax due and owing thereon was the sum of \$3,441.00, whereas, as he then and there well knew, their joint taxable income for the said calendar year was the sum of \$71,220.21, upon which said taxable income there was owing to the United States

of America an income tax of \$26,837.95, in violation of Section
7201, Internal Revenue Code; 26 U.S.C., Section 7201.

A TRUE BILL

FORWARDED

PETER C. BORSEY
UNITED STATES ATTORNEY

MICHAEL HARTHERE
ASSISTANT UNITED STATES ATTORNEY

RECEIVED
MAY 1 1976
U.S. DISTRICT COURT
NEW HAVEN, CONNECTICUT

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

FILED
MAY 11 2 17 PM '76
U.S. DISTRICT COURT
NEW HAVEN, CONN.

UNITED STATES OF AMERICA

v.

CRIMINAL NO. H-75-52

SYLVIO J. GRASSO

RULING ON DEFENDANT'S MOTION TO DISMISS

The issue presented by defendant's motion to dismiss is whether the Double Jeopardy Clause of the Fifth Amendment will be violated by the retrial of the defendant, Sylvio J. Grasso, after his original trial ended in a mistrial declared by the trial judge, sua sponte.

I.

The moving papers indicate that on April 16, 1975, the defendant was indicted on three counts of income tax evasion for the years 1969, 1970 and 1971, in violation of 26 U.S.C. § 7201. Since the government revealed its intention to proceed on a net worth theory of prosecution, the defendant moved for and received broad pretrial discovery. Trial commenced on November 4, 1975, before the Honorable T. Emmet Clarie, Chief Judge, and a jury duly empanelled and sworn. During the next eight trial days, the government called over 40 witnesses to testify on its case-in-chief; the defendant presented ten witnesses, including himself; the government called three witnesses in rebuttal; and, over 300 documents were admitted as exhibits. In addition, the parties filed extensive requests for jury instructions. On November 26, 1975, as the government was preparing to call its final rebuttal witnesses, Judge Clarie aborted the trial on his own

A-9.

motion after a two-day hearing.

The circumstances leading to the mistrial were as follows. During the course of the government's direct case, one Daniel Harris was called to testify. Harris had multiple felony convictions in his background and was presently serving a term of imprisonment of 3-30 years imposed in 1971 for the sale of heroin. However, he had had favorable consideration from the Board of Parole and was due to be released from prison in December, 1975. Harris testified at length that he and the defendant had engaged in numerous transactions involving the purchase and sale of heroin in the year 1970. The obvious purpose of this evidence was to establish an illegal source for the defendant's alleged unreported income in the calendar year 1970. Harris' testimony extended over a period of a day and a half and consumed over 120 pages of transcript.

Several days after he testified, Harris contacted Henry Rothblatt, the defendant's attorney, and requested an interview at the local jail. Rothblatt visited Harris and recorded a full recantation of Harris' trial testimony. Among other things, Harris stated that his false testimony was influenced by coercion and threats made by government prosecutors and the agents in charge of the tax case. He asserted that when he informed these officials prior to trial that he did not wish to appear, they responded that unless he changed his mind his parole would be revoked, he would have to serve the full 30 years of his sentence, and he would also be indicted on a perjury charge because of his grand jury appearance in the instant case. As a consequence, he claimed he was forced to testify falsely against the defendant.

Rothblatt immediately relayed Harris' disclosures to Judge Clarie and filed a motion to dismiss based on prosecutorial misconduct, citing as authority Giglio v. United States, 405 U.S. 150 (1972); Brady v. Maryland, 373 U.S. 83 (1963); and Berger v. United States, 295 U.S. 78 (1935). Hearings were held on November 21 and 25, at which ten witnesses were heard outside the presence of the jury. However, Harris refused to testify, relying on the protections afforded by the Fifth Amendment.

On November 26, Judge Clarie ruled in relevant part as follows.

The Court: The Court has, as counsel may well imagine, given considerable thought to this problem that has arisen. I never had the question arise in this form during a trial before.

But the Court is of the opinion that because of the perjury issue injected into the trial by the testimony of Daniel Harris, that the defendant Grasso can not get a fair and impartial trial under the present circumstances.

If the issue went to the jury it would not be whether or not he failed to pay his income taxes; the issue would be of selling narcotics, which is in and of itself a kind of abhorrent business to most every one of us. The issue would become whether or not he was selling narcotics, and whether or not this man, Daniel Harris, could be believed.

To do that we'd have to go way back to the statement to the three Hartford policemen and the County Detective in '71, and get the facts as to how the story originated, with the documents which are in evidence. And we'd have to begin to review the testimony before the grand jury that Mr. Buckley elicited when he was prosecutor, or assistant prosecutor.

We'd have to review the tape, as has been filed in evidence by counsel, which he procured at the jail. We'd have to review the statement of the I.R.S. witnesses who went over and received from him what is claimed to be an apparent contradiction of the tape.

And the issue of Mr. Grasso's income tax evasion

would be well lost in the question of whether or not Daniel Harris committed perjury. That would be the nub of the case, rather than the question of the defendant's failure to pay his income taxes.

For this reason the Court is of the opinion that the motion to dismiss would be denied, but that a mistrial should be ordered, because there is a manifest necessity for declaring a mistrial. Otherwise, the ends of justice, public justice, would be defeated.

And that is what the Court is going to do. The Court is of the opinion that to permit the trial to go forward under the present circumstances would be an injustice to Mr. Grasso.

The Court can not find that there was improper conduct on the part of the prosecutor, or as far as the Government agents or investigators are concerned. The Court certainly is of the opinion that this man, Daniel Harris, couldn't be believed if he put his hand on two Bibles -- I wouldn't believe him under any circumstances, after hearing what has been educed here in this trial. I don't think he is believable.

But to say that the Government knew he was not truthful and put him on notwithstanding that, I think would be an unfair accusation.

* * *

But I think it would be unfair to Mr. Grasso to let that become a focal point of whether this case should be tried and go forward. Because if he were found guilty it would always be a conclusion of his, certainly, and possibly of others, that that was the reason for the jury's conclusion of guilt, because of the contamination of the alleged sale of narcotics, based upon perjurious testimony of Daniel Harris.

The Court is firmly of the opinion that a mistrial should be granted. And the Government can decide whether or not at any future time they wish to proceed further with the prosecution. At that time the issue of double jeopardy could be argued, and can move in proper form at that time.

That is the ruling of the Court. (Tr., November 26, 1975, pp. 12-14).

As soon as the judgment of the court was announced, Assistant United State's Attorney Hartmere responded:

Your Honor, for the record, the Government strongly opposes the Court's ruling. (Id., at 14).

In addition, Attorney Rothblatt took exception to the court's decision and unsuccessfully attempted to renew his request for a judgment of acquittal.

In discharging the jury, Judge Glarie further amplified his reasons for declaring a mistrial:

Now, because this, because of this perjury issue being injected into this trial by the testimony of the witness, Daniel Harris, the Court is of the opinion that a fair and impartial trial can not be assured for the defendant.

For this reason the jury is discharged, is discharged from giving a verdict in this case, because there is a manifest necessity for declaring a mistrial. Otherwise, the ends of justice would be defeated. The factual issues are income tax evasion -- what the trial is all about, and they have been indelibly stained with the perjury of Daniel Harris concerning the defendant's alleged dealings in narcotics.

His statement infected and contaminated the trial so that the defendant could not get a fair trial on the allegations of income tax evasion with which he'd been charged.

* * *

Now, I am not permitted to determine under the circumstances where the truth lies, but certainly under the circumstances I would not believe Daniel Harris.

In a case that starts out as an income tax evasion case it is necessary of course for the Government to demonstrate and prove that there were possible other sources of income, in addition to showing that he failed to report them. And it concerned all this extra money. It is incumbent upon the Government to demonstrate and show that there are possible sources of income.

Now, had Daniel Harris testified that the defendant was in the newspaper business, on the side, or that he was selling peanuts on the side, and he lied about it, it wouldn't be nearly as damaging as to say that he sold

bundles of heroin. Once you get into that area of heroin and narcotics, it is the opinion of the Court that the question of truth or falsity of this Daniel Harris, a crucial witness, contaminates the trial; it leaves a stain.

Because the jury -- many people today, anyone connected with narcotics, it is the most terrible thing that could happen to them, because everybody is so distressed about narcotics.

But here the man accuses the defendant of being involved in narcotics, in an income tax trial. And it seems to me that that has so contaminated the issues -- particularly with the give and take of truth or falsity here -- that under the circumstances a fair trial could not be secured for the defendant.

And above everything else it is the Court's duty -- sometimes it is unpleasant after sitting for eight days, as you have -- and I have listened for a couple of days to other testimony in the case -- with all the back up of business we have, to have to declare a mistrial.

But justice comes first. And if that is what is necessary, it is the duty of the Court to declare a mistrial.

It is then up to the Government to decide whether they want to try the case over again, before another jury, and it is the privilege of the defendant to argue at that time the principle of double jeopardy. And at that time that issue will be resolved at any future trial that might be had.

So I briefly, summarily, have given you this background in a nutshell. It is an unusual happening during the course of a trial, but those things will and can happen.

The paramount thing is to assure every defendant who comes into this court a fair trial. That is the duty of the Court, and upon that basis the Court will follow that principle. (Tr., November 25, 1975, pp. 15-16, 17-19).

When the government set his case down for a retrial, the defendant promptly filed the instant motion to dismiss which Judge Clarie assigned to this Court for disposition.

II.

It is settled law that, in the absence of the defendant's request or consent, there can be a new trial after a mistrial has been declared if "there is a manifest necessity for the [mistrial] or the ends of public justice would otherwise be defeated." United States v. Perez, 9 Wheat. 579, 580 (1824). See also United States v. Jorn, 400 U.S. 470, 481 (1971); Wade v. Hunter, 336 U.S. 684, 691 (1949); Simmons v. United States, 142 U.S. 148, 154 (1891). The manifest necessity test of Perez obviously contemplates a sound and sensitive exercise of discretion by the trial judge which must be tested on a case by case basis. United States v. Dinitz, ____ U.S. ____ (March 8, 1976); Illinois v. Somerville, 410 U.S. 458, 462 (1973); United States v. Gentile, 525 F.2d 252, 255-256 (2 Cir. 1975).

In deciding whether to declare a mistrial sua sponte, a trial judge must carefully weigh the defendant's valued right to have his trial completed by a particular jury, Dowd v. United States, 372 U.S. 734, 736 (1963), with society's interest in fair trials designed to insure just judgments. United States v. Jorn, supra at 480. Various factors may be placed on the scale. A motion for a mistrial made by the defendant or with his consent may remove the barrier to reprosecution, even in the presence of prosecutorial or judicial error. United States v. Jorn, supra at 485; see also United States v. Dinitz, supra; United States v. Gentile, supra. Another trial is permissible if the judge, in declaring a ^{new} mistrial sua sponte, was acting "in the sole interest of the defendant," United States v. Cori, 367 U.S.

364, 369 (1961), or if "a verdict of conviction could be reached but would have to be reversed on appeal due to an obvious error in the trial." Illinois v. Somerville, supra at 464. On the other hand, jeopardy attaches if the defendant "would be harassed by successive, oppressive prosecutions," or if the judge "exercises his authority to help the prosecution, at a trial in which its case is going badly, by affording it another, more favorable opportunity to convict the accused." Gori v. United States, supra at 369; see also United States v. Jorn, supra at 486.

III.

Applying these principles to the facts in the instant case, the Court, for several reasons, is compelled to conclude that a retrial would violate the defendant's constitutional right not to be twice put in jeopardy.

First, contrary to the government's suggestion, the defendant did not request a mistrial. The presentation of the motion to dismiss, the arguments of counsel pursuant thereto, the ruling of the trial judge, and the reaction of the attorneys immediately following the announcement of the mistrial, disclose conclusively that the only motion offered or intended to be offered was the motion to dismiss. There was no mention of a request for a mistrial as an acceptable alternative. It is also significant to note that Judge Clarie stated on two occasions during his oral ruling that the "principle of double jeopardy" might be a relevant consideration in the event the government decided "to proceed further with the prosecution" before another jury. The references to a possible jeopardy defense at a retrial clearly indicate Judge Clarie was granting a mistrial sua sponte and not in

response to the defendant's request. See United States v. Dinitz, supra; United States v. Jorn, supra.

Second, the Court must reject the government's contention that there was an implied consent to the mistrial because the defendant's attorney engaged in a course of conduct calculated to abort the trial. Compare United States v. Gentile, supra. While it is true that the dismissal petition triggered the sua sponte declaration of a mistrial, it is plain from the record that there was neither impropriety or misconduct on the part of defense counsel during the events and proceedings surrounding the mistrial nor was the motion to dismiss a frivolous petition. As an officer of the court and lawyer for the defendant, Attorney Rothblatt had the affirmative duty to promptly notify the trial judge that a witness had recanted his sworn testimony. Probable perjurious testimony must, of course, be immediately reported to the presiding judge in the interests of justice and to preserve the integrity of the judicial process.

Recantation of a witness' testimony at trial is not a rare occurrence. See, e.g., United States ex rel. Sostre v. Feata, 513 F.2d 1313 (2 Cir. 1975); United States ex rel. Rice v. Vincent, 491 F.2d 1326 (2 Cir. 1974); United States v. Silverman, 430 F.2d 106 (2 Cir. 1970); United States v. Polisi, 416 F.2d 573 (2 Cir. 1969); United States v. Mitchell, 29 FRD 157 (D.N.J. 1962). Generally, false testimony is uncovered after trial and fathers an action for relief under Rule 33, Fed. R. Crim. P., or pursuant to 28 U.S.C. § 2255 or by way of a writ of habeas corpus.

When alleged perjury is revealed after a witness has testified but while the trial is still in progress, as in the

case at bar, the trial judge has several options available to insure that the jury receives the impeaching evidence for its consideration in appraising the witness' credibility. These include the recall of the witness for further cross-examination and the introduction, if necessary, of the affidavit, tape-recording, or other document setting forth the recantation. Rules 607, 801(d)(1), 804(a)(2) and 804(b)(1), Federal Rules of Evidence (1975); cf. United States v. Pfingst, 493 F.2d 262 (2 Cir. 1973), cert. denied, 417 U.S. 919 (1974); United States v. Klein, 483 F.2d 481 (2 Cir. 1973), cert. denied, 419 U.S. 1091 (1974); United States v. Blackwood, 456 F.2d 526 (2 Cir.), cert. denied, 409 U.S. 863 (1972); United States v. DeSisto, 329 F.2d 929 (2 Cir.), cert. denied, 377 U.S. 979 (1964).

Thus, in the present case, if the incident involved only a recantation, without more, it must be assumed that, depending on the circumstances, Harris would have been recalled for further examination or the tape-recording would have been introduced into evidence. Cf. United States v. Jorn, supra at 485. However, in addition to the repudiation of his incriminating testimony, Harris relayed to Rothblatt certain facts which, if true, disclosed serious governmental misconduct sufficient to justify a dismissal. Cf. United States v. Gerry, 515 F.2d 130, 144 (2 Cir. 1975); United States v. McCord, 509 F.2d 334, 349 (D.C. Cir. 1974), cert. denied, 421 U.S. 930 (1975). Rothblatt's disclosures to Judge Clarie and the defendant's motion to dismiss, therefore, were consistent with the obligations of trial counsel and the procedural due process rights afforded an accused at trial.

Third, the Court is constrained to overrule the govern-

ment's argument that under the standards enunciated in Gori, 367 U.S. at 369, reprosecution is not barred because the mistrial was "obviously in the sole interest of the defendant." Judge Clarie noted after the hearing on the motion to dismiss that Harris was a "crucial" government witness (Tr., November 26, 1975, p. 12) who "couldn't be believed if he put his hand on two Bibles" (Id.) and whose credibility "contaminates the trial" (Id. at 18). It necessarily follows, therefore, that if the trial had been permitted to continue and the recantation evidence had been presented to the jury, it was more than likely the jury would have completely discounted Harris' testimony, as indeed Judge Clarie did, and acquitted the defendant, at least with respect to the 1970 tax year. There is little question that the recantation provided unexpected but welcomed evidentiary weaponry in defense counsel's arsenal to wage a strong assault on the government's case by renewed cross-examination and in summation. Few tools are more valuable to the skillful and experienced trial advocate to gain an acquittal in a criminal case than the sword of impeachment in combination with the shield of the doctrine of reasonable doubt. This is especially true in the context of a complex net worth tax prosecution wherein likely sources of unreported income are vital to a conviction. The mistrial here prevented defense counsel from discrediting a key government witness on this essential element of the crime and deprived the defendant of "the right to seek a favorable verdict from the first jury." United States v. Glover, 506 F.2d 291, 298 (2 Cir. 1974). As stated by Justice Harlan in Jorn:

... in the final analysis, the judge must always temper the decision whether or not to abort the trial by considering the importance

to the defendant of being able, once and for all, to conclude his confrontation with society through the verdict of a tribunal he might believe to be favorably disposed to his fate. 400 U.S. at 486.

In addition, although the government objected to the mistrial, reprosecution would give it a solid tactical advantage. With commendable candor at the oral argument before this Court, government counsel admitted Harris would not be a witness on retrial. Thus the government would have ample time to retrench, to reconstruct its evidence, and to present its case against the defendant for the year 1970 without the tainted Harris testimony; or, it might proceed to seek convictions solely for the years 1969 and 1971. Cf. United States v. Kin Ping Cheung, 485 F.2d 689, 691-692 (5 Cir. 1973). While certainly not Judge Clarie's intention, it is evident that the mistrial served "as a post-jeopardy continuance to allow prosecution an opportunity to strengthen its case." Somerville 410 U.S. at 469.

Fourth, the defendant has submitted evidence, not controverted by the government, that a retrial would be oppressive and would hamper the right to counsel of his own choice. Cf. Green v. United States, 355 U.S. 184, 187-188 (1957). A retrial would constitute the fourth major criminal trial instituted against this defendant in recent years. In short, he is unable to retain private counsel for the next trial; he is substantially indebted to Attorney Rothblatt for services rendered to date; and, he has strained his financial resources to the limit.

Fifth, the trial was aborted after it had proceeded at length with a substantial amount of evidence introduced -- far beyond the situation in Downum and Somerville. Cf. United

States v. Clover, supra at 298. A conscientious preparation by court-appointed counsel at this stage of the proceedings would require extraordinary intrusions on the lawyer's time, exhaustive research and inspection of records, transcripts and exhibits, and would inevitably result in an inordinate delay affecting the defendant's right to a speedy trial.

Accordingly, the defendant's motion to dismiss is granted.

Dated at New Haven, Connecticut, this 13th day of May, 1976.

Robert C. Zampano
United States District Judge

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

* * * * *

UNITED STATES OF AMERICA

vs.

SYLVIO J. GRASSO

*

*

*

CRIMINAL ACTION

NO. H-75-52

* * * * *

Before: HON. T. EMMET CLARIE, CHIEF JUDGE

PROCEEDINGS OF NOVEMBER 26, 1975

Elliott Sperber
Official Court Reporter
U.S. District Court
District of Connecticut

A-22.

(In the absence of the jury):

MR. HARTMERE: Your Honor, before we begin arguments I believe I should state for the record that Mr. Beitz, co-counsel on this case, returned to Washington early this morning, I believe. He was informed late last night, after court ended, that his father had died.

His family is in Oregon, but he left early this morning. We're not sure at this time when he'll be back -- probably Tuesday. But no arrangements had been made or anything when I talked to him.

THE COURT: The Court is sorry it happened, although things do happen in life -- that's why we're here for a very temporary period. And you may express to him the Court's sympathy on the passing of his father.

MR. HARTMERE: Thank you, your Honor, I will.

THE COURT: Are counsel ready to proceed?

MR. ROTHBLATT: Yes, your Honor.

Your Honor, the defendant, Grasso, at this time, in view of the testimony and the evidence submitted before your Honor, moves this Court for a dismissal of the indictment in this case, under the authority of Brady against Maryland, 373 U.S. 83; Berger against the United States, 295 U.S. 78, and Giglio against the United States, 405 U.S. 150.

A-23.

1 In all of these cases, your Honor, the United
2 States Supreme Court stressed that fundamental in our
3 great system of American justice is due process to the
4 accused. And due process to the accused means fairness,
5 basic fairness, which goes to the heart of the judicial
6 system.

7 And that means whenever there is any mis-conduct
8 on the part of the prosecution -- and I don't say this
9 malevolently, because I don't think what was done here
10 was done intentionally by Mr. Hartmere -- But I don't
11 excuse members of the Internal Revenue Service, who
12 played a very active role in all of the activities here.

13 What they did, your Honor, they not only caused
14 this witness, Mr. Daniel Harris, to give false testimony
15 before this jury, but in my judgment, worse than that,
16 after this witness recanted and told the truth that he
17 did, as he did on the tape that's marked as a Court
18 Exhibit -- I submit this is good, sound evidence under
19 new Federal rules 804(a)(1), 804(a)(2), 804(b)(3) -- it
20 is very clear not only did they cause this witness to
21 get on the witness stand and lie, as he told them he was
22 reluctant to get on -- and he was very clear -- they
23 threatened him, as the evidence indicates, threatened him
24 with perjury; threatened to send him back to State's
25 Prison for thirty years if he didn't continue to lie.

A-24.

1 And then they compounded that horrid, offensive
2 and prejudicial conduct, after the witness confers with me
3 and relates the truth, and attempt to cover up by saying
4 that this was precipitated by threats; when there isn't
5 a single bit of evidence before this Court to justify
6 such facts.

7 Certainly, knowing that counsel, myself, was there
8 to get the truth -- and I did get the truth -- they should
9 have bent every effort to get Mr. Harris' version of what
10 occurred, so that the truth can come out in this court.
11 They should have taped it, made available everything that
12 took place, for this Court to hear out of Mr. Harris'
13 ownmouth what had transpired.

14 This they deliberately failed to do, and then
15 continued to cover up by saying that what he told me is the
16 result of a threat, and didn't support it by the slightest
17 bit of evidence.

18 Your Honor, this entire case stands or falls on
19 Mr. Harris' testimony. The Government's first two counts,
20 dealing with 1969 and 1970, fall as a matter of law. It
21 has been proven in 1969 that they made a mathematical
22 error; they failed to take into account the prior tax
23 losses. And Mr. Fulco explained that. 1970 was fully
24 explained, and they failed to take into account the
25 monies received by Mary Jane Shirley.

A-25...

1
2 So they got one year left, 1971. And upon that
3 they had to cover up. And the law is clear: they had to
4 have some direct evidence to make out their case, to
5 support the case of circumstantial evidence, which was
6 consistent with the innocence of Mr. Grasso.

7 So they trumped up Danny Harris' testimony. And
8 they knew, and they nurse-maided him all the way through:
9 these repeated visits at the prison, failure to record
10 their conferences with him, failure to make appropriate
11 notes; using the slim excuse that it was in the hands
12 of the United States Attorney.

13 Then on the fatal day when his testimony was
14 given, when he indicated to them that he didn't want to
15 get on the stand, they threatened him to repeat that lie.

16 Your Honor, I don't know of any conduct that
17 strikes the heart of the judicial process, than what we
18 have witnessed in this court. And that your Honor, as
19 a matter of law -- and as I believe Judge Byrne did
20 in the famous case of the United States versus Ellsberg --
21 where the Government's misconduct having polluted this
22 trial, that justice calls for a direction of a verdict
23 of acquittal in this case.

24 And I strongly urge it.

25 MR. HARTMERE: Your Honor, may it please the Court,

A-26.

1 the Government obviously opposes defense counsel's motion
2 for a judgment of dismissal. There is no evidence before
3 the Court, knowing what was brought out during the
4 extensive hearings on this, of any threat to the witness
5 Daniel Harris -- none whatsoever.

6 The only evidence of that is what appears on the
7 tape which Daniel Harris told three Federal agents was
8 a lie. And it is an entire lie. And that's the only
9 evidence of any threats. There were none brought out
10 in any hearing. There is no evidence of any prosecutorial
11 or Government misconduct brought out in this case;
12 none whatsoever.

13 There is no evidence that Daniel Harris was ever
14 threatened with perjury.

15 Originally, when defense counsel moved for this
16 motion he claimed that the prosecutors had threatened
17 him with perjury. He now admits that was in error; that
18 we never threatened him with perjury. And under the
19 facts as they came out, obviously there was no ground
20 to even threaten him with perjury if the Government was
21 so inclined -- which we weren't, and never would do.
22 There was no basis for that. And that seems to be
23 conceded at this point.

24 The testimony of Daniel Harris was --

25 THE COURT: You mean as a matter of law?

A-27

1 MR. HARTMERE: Yes, your Honor, as a matter of
2 law.

3 THE COURT: I think there are cases -- I think
4 we had one here about two years ago -- where a man testi-
5 fied in the grand jury, and then he took the Fifth
6 Amendment when he came into court, and the issue was
7 raised at that time. And the Court ruled that each
8 individual judicial process is a separate entity, and
9 the mere fact he testified in the grand jury is not a
10 waiver of the Fifth Amendment rights.

11 I'm not speaking of this case, but generally.
12 A man might have lied in the grand jury, and if he told
13 the truth on the witness stand he'd be in for perjury,
14 so he's entitled to use the Fifth Amendment to protect
15 himself from prosecution.

16 MR. HARTMERE: That's correct, your Honor.

17 THE COURT: That's under the ruling of the Court.

18 MR. HARTMERE: And it was our understanding at all
19 times -- and Daniel Harris never communicated to any
20 Government agents anything other than he did not want
21 to testify, and might refuse to testify.

22 I submit to the Court in and of itself that could
23 not be perjury. If he refused to testify he might be
24 held in contempt of court, but he could not be held for
25 perjury for refusing to testify -- no matter what he

A-28

1 didn't say, obviously.

2 There is no testimony, there is no -- if there is
3 no testimony, there is no perjury.

4 THE COURT: If he used the Fifth Amendment he
5 couldn't be held in contempt.

6 MR. HARTMERE: Yes, he could be held in contempt.

7 THE COURT: For what reason? You mean for
8 exercising his Fifth Amendment?

9 MR. HARTMERE: Not for exercising his Fifth
10 Amendment. If he came in and refused to testify.

11 THE COURT: Oh, for that reason alone?

12 MR. HARTMERE: But that would be up to the Court,
13 not the Government. The Government obviously could not
14 bring charges for his refusing to testify. And there's
15 been no evidence that he ever communicated anything but
16 that to the Government.

17 And the only time he ever mentioned, as was brought
18 out by the evidence, that he might change his testimony
19 and say what he said on the witness stand was false,
20 was in his initial interview with Courtney Bourns, his
21 Court-appointed attorney.

22 And Mr. Bourns testified that in the course of
23 the hours that passed afterwards, when he was conferring
24 with Government counsel and with his client, the client
25 never again mentioned that he was going to change his.

A-29

1 testimony. That was never in issue.

2 The Court will recall the conference at side bar;
3 the only thing that was ever in issue was the witness'
4 fear for his life, and for the safety of his family.
5 And that's all that the Government had any knowledge of.

6 Certainly we had no knowledge of his changing his
7 testimony. And apparently, by his Court-appointed
8 attorney's own testimony, he didn't think that was in
9 issue either. Other than one initial statement, which
10 he then determined, after hours of talking to the man, that
11 that wasn't the real issue.

12 The real issue was whether he was afraid to
13 testify, and what the Government would do for him if he
14 did testify. That was the brunt of the whole issue.

15 So, obviously, your Honor, there is no evidence
16 before this Court of any cover up by the Government,
17 by saying there were threats. We had obviously --
18 obviously the Court is the fact-finder in this situation.
19 We had three Federal agents testify that that's what
20 Daniel Harris told them. He told them that he had been
21 threatened, and that he then retracted his statement,
22 after a phone call conversation, where he was advised to
23 call Bart Grasso, who in turn advised him to call
24 Attorney Rothblatt. Now, that's from the witness, Harris,
25

A-30

10
1 as testified to by the three agents.

2 Now, your Honor, as the finder of facts, will
3 determine the credibility here. But I submit there is
4 nothing in evidence for the Government to contend with
5 except the tape. And obviously we can't cross examine
6 the tape.

7 When the witness was called back and took the
8 Fifth Amendment we couldn't pursue it with him.

9 There is also evidence that the witness has been
10 in fear and has been threatened since July 25, 1975.
11 And I submit this is just a continuation of the same
12 threats and the same fears that he's been experiencing
13 for six months.

14 Finally, your Honor, the Government respectfully
15 submits that the defendant's motion for dismissal should
16 be denied.

17 Thank you.

18 THE COURT: The Court has, as counsel may well
19 imagine, has given considerable thought to this problem
20 that has arisen. I never had the question arise in this
21 form during a trial before.

22 But the Court is of the opinion that because of
23 the perjury issue injected into the trial by the testimony
24 of Daniel Harris, that the defendant Grasso can not get
25 a fair and impartial trial under the present circumstances.

A-31

1 If the issue went to the jury it would not be
2 whether or not he failed to pay his income taxes; the
3 issue would be of selling narcotics, which is in and
4 of itself a kind of abhorrent business to most every
5 one of us. The issue would become whether or not he
6 was selling narcotics, and whether or not this man,
7 Daniel Harris, could be believed.

8 To do that we'd have to go 'way back to the
9 statement to the three Hartford policemen and the County
10 Detective in '71, and get the facts as to how the story
11 originated, with the documents which are in evidence.
12 And we'd have to begin to review the testimony before
13 the grand jury that Mr. Buckley reduced when he was
14 prosecutor, or assistant prosecutor.

15 We'd have to review the tape, as has been filed
16 in evidence by counsel, which he procured at the jail.
17 We'd have to review the statement of the I.R.S. witnesses
18 who went over and received from him what is claimed to
19 be an apparent contradiction of the tape.

20 And the issue of Mr. Grasso's income tax evasion
21 would be well lost in the question of whether or not
22 Daniel Harris committed perjury. That would be the nub
23 of the case, rather than the question of the defendant's
24 failure to pay his income taxes.

25 For this reason the Court is of the opinion that

A-32

1 the motion to dismiss would be denied, but that a mis-
2 trial should be ordered, because there is a manifest
3 necessity for declaring a mistrial. Otherwise, the
4 ends of justice, public justice, would be defeated.

5 And that is what the Court is going to do. The
6 Court is of the opinion that to permit the trial to go
7 forward under the present circumstances would be an
8 injustice to Mr. Grasso.

9 The Court can not find that there was improper
10 conduct on the part of the prosecutor, or as far as the
11 Government agents or investigators are concerned. The
12 Court certainly is of the opinion that this man, Daniel
13 Harris, couldn't be believed if he put his hand on two
14 Bibles -- I wouldn't believe him under any circumstances,
15 after hearing what has been educed here in this trial.
16 I don't think he is believable.

17 But to say that the Government knew he was not
18 truthful and put him on notwithstanding that, I think
19 would be an unfair accusation.

20 I don't want to be unfair to Mr. Courtney Bourns,
21 who has always been considered a very capable young man,
22 and certainly above reproach, but I do think that had
23 he acquainted the Court with the dilemma that he at one
24 time appeared to have, that the matter could have been
25 properly handled by the Court at that time, in a timely

A-33.

1 fashion.

2 And whether because of his inexperience, or con-
3 fusion on the part of the discussion he had at that
4 time -- I don't know what caused him to act in the
5 manner that he did. But still I think he's a nice young
6 man, and didn't deliberately do anything wrong, but I
7 think he was unwise in his decision. All of us are
8 entitled to make mistakes along the way, with the
9 confusion and pressure of the times. He was called in
10 here by the Clerk on short notice, and tried seemingly
11 the best he could to supplement his own information
12 by calling other competent, known criminal lawyers,
13 like James Wade that he mentioned, and Hubert Santos --
14 and he tried apparently to do what was right. But, I
15 think that was where the error crept into this case.

16 But I think it would be unfair to Mr. Grasso
17 to let that become a focal point of whether this case
18 should be tried and go forward. Because if he were
19 found guilty it would always be a conclusion of his,
20 certainly, and possibly of others, that that was
21 the reason for the jury's conclusion of guilt,
22 because of the contamination of the alleged sale
23 of narcotics, based upon perjurious testimony of
24 Daniel Harris.
25

A-34

1 The Court is firmly of the opinion that a mistrial
2 should be granted. And the Government can decide
3 whether or not at any future time they wish to proceed
4 further with the prosecution. At that time the issue of
5 double jeopardy could be argued, and can move in proper
6 form at that time.

7 That is the ruling of the Court.

8 Call the jury, Mr. Bailiff.

9 MR. HARTMERE: Your Honor, for the record, the
10 Government strongly opposes the Court's ruling.

11 MR. ROTHBLATT: Of course, your Honor, the defen-
12 dant agrees with everything that your Honor has decided,
13 except your Honor's decision to declare it a mistrial.
14 We would renew our request for judgment of acquittal.

15 THE COURT: I understand. The same ruling stands.

16 Call the jury, Mr. Bailiff.

17 (In the presence of the jury):

18 THE COURT: Good morning, ladies and gentlemen of
19 the jury.

20 THE JURY: Good morning, your Honor.

21 THE COURT: I believe we have spent eight trial
22 days when the jury was present on this case, and I know
23 that all of you worked very hard and diligently in
24
25

A-35

1 handling the exhibits.

2 But just before the conclusion of the case --
3 I thought we had probably another day to go -- a question
4 arose in court concerning the testimony of Daniel Harris.
5 He was the man, you remember, that was brought here from
6 the State's Prison and testified that he had had dealings
7 with the defendant in the handling of narcotics, heroin.

8 And the following day, I think, apparently he called
9 defense counsel from the jail. Defense counsel went over
10 to the jail with a tape recorder and took a statement
11 from him, from Daniel Harris.

12 And Daniel Harris testified on the tape that he would
13 recant his previous testimony and state that he had no
14 dealings with the defendant, Mr. Grasso, in the field
15 of narcotics.

16 And when that matter was called to the attention
17 of the Court the tape was filed here and played to the
18 Court in Chambers, on a recorder, and the Court excused
19 you from further hearing this matter until this matter
20 was investigated and we had a hearing concerning the facts
21 of what had occurred.

22 So for the past day and a half we have been hearing
23 testimony on that particular issue, the alleged perjury
24 of Daniel Harris.

25 Now, because this, because of this perjury issue

A-36.

1 being injected into this trial by the testimony of the
2 witness, Daniel Harris, the Court is of the opinion that
3 a fair and impartial trial can not be assured for the
4 defendant.

5 For this reason the jury is discharged, is discharged
6 from giving a verdict in this case, because there is a
7 manifest necessity for declaring a mistrial. Otherwise,
8 the ends of public justice would be defeated. The factual
9 issues are income tax evasion -- what the trial is all
10 about, and they have been indelibly stained with the
11 perjury of Daniel Harris concerning the defendant's
12 alleged dealings in narcotics.

13 His statement infected and contaminated the
14 trial so that the defendant could not get a fair trial on
15 the allegations of income tax evasion with which he'd been
16 charged.

17 If the case were to continue and we were to still
18 place in the hands of the jury the issues of this alleged
19 perjurious testimony we would have to go back to the
20 circumstances in 1971, after Daniel Harris was sentenced
21 to a term of not less than eight nor more than thirty
22 years in State's Prison for his dealings in narcotics.
23 Remember, we heard part of that on his examination and
24 cross examination, when the statement was given to the
25

A-37

1 County Detective and Officer D'Onofrio, and the Hartford
2 Police, and I think there was an Officer Sullivan of the
3 Hartford Police, and the county detectives.

4 We'd have to review that and bring that up through
5 the grand jury testimony of Daniel Harris before the
6 grand jury in 1973.

7 We'd have to bring that up to the date of trial,
8 with all statements that he's made to various people
9 who interviewed him, purportedly reaffirming his
10 testimony, until he changed his testimony at the jail
11 on this tape recording which is a matter of exhibit in
12 this case. It was given out of your presence.

13 And the following day, an agent of the Internal
14 Revenue went over to the jail and Daniel Harris told
15 him that his statement put on the tape was a lie, that
16 it was false, and he did it because of threats against
17 him.

18 Now, I am not permitted to determine under the
19 circumstances where the truth lies, but certainly under
20 the circumstances I would not believe Daniel Harris.

21 In a case that starts out as an income tax
22 evasion case it is necessary of course for the Government
23 to demonstrate and prove that there were possible other
24 sources of income, in addition to showing that he failed
25 to report them. And it concerned all this extra money.

A-38

1 It is incumbent upon the Government to demonstrate and
2 show that there are possible sources of income.

3 Now, had Daniel Harris testified that the defendant
4 was in the newspaper business, on the side, or that he
5 was selling peanuts on the side, and he lied about it,
6 it wouldn't be nearly as damaging as to say that he
7 sold bundles of heroin. Once you get into that area of
8 heroin and narcotics, it is the opinion of the Court that
9 the question of truth of falsity on this Daniel Harris,
10 a crucial witness, contaminates the trial; it leaves a
11 stain.

12 Because the jury -- many people today, anyone
13 connected with narcotics, it is the most terrible thing
14 that could happen to them, because everybody is so dis-
15 tressed about narcotics.

16 But here the man accuses the defendant of being
17 involved in narcotics, in an income tax trial. And it
18 seems to me that that has so contaminated the issues --
19 particularly with the give and take of truth and falsity
20 here -- that under the circumstances a fair trial could
21 not be secured for the defendant.

22 And above everything else it is the Court's duty --
23 sometimes it is unpleasant after sitting for eight days,
24 as you have -- and I have listened for a couple of days
25

A-39

1 to other testimony in the case -- with all the back up
2 of business we have, to have to declare a mistrial.

3 But justice comes first. And if that is what is
4 necessary, it is the duty of the Court to declare a
5 mistrial.

6 It is then up to the Government to decide whether
7 they want to try the case over again, before another
8 jury, and it is the privilege of the defendant to argue
9 at that time the principle of double jeopardy. And at
10 that time that issue will be resolved at any future trial
11 that might be had.

12 So I briefly, summarily, have given you this
13 background in a nutshell. It is an unusual happening
14 during the course of a trial, but those things will and
15 can happen.

16 The paramount thing is to assure every defendant
17 who comes into this court a fair trial. That is the
18 duty of the Court, and upon that basis the Court will
19 follow that principle.

20 The Supreme Court has similarly so declared in
21 cases which have come before it, going way back to the
22 early days of the founding of this country, up through to
23 the present time.

24 There are numerous cases on this point, and
25

A-40

1 briefly, succinctly stated, it was Justice Story who
2 said "We think that in all cases of this nature the
3 law has invested courts of justice with the authority
4 to discharge a jury from giving any verdict whenever in
5 their opinion, taking all the circumstances into
6 consideration, there is a manifest necessity for the
7 act or the ends of public justice would otherwise be
8 defeated."

9 The Court is of the opinion that this case
10 deserves that kind of treatment. For that reason the
11 Court thanks you, ladies and gentlemen, for your
12 careful attention to this matter, and your diligent
13 review of all of these documents, those hundreds of
14 documents that have come before you.

15 And the Court declares a mistrial. It will be
16 up to the prosecution to decide whether they want to
17 retry it again before a different jury.

18 So, we trust that tomorrow being Thanksgiving,
19 Thanksgiving Day, and a national holiday, that you will
20 forget about this case and enjoy tomorrow a happy
21 holiday with your family.

22 Thank you, ladies and gentlemen.

23 Adjourn court, Mr. Bailiff.
24
25

A-41

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA
vs.
SYLVIO J. GRASSO

* CRIMINAL ACTION
* NO. H-75-52
*

Before: HON. T. EMMET CLARIE, CHIEF JUDGE

TRANSCRIPT OF TAPE RECORDING, COURT EXHIBIT G

Elliott Sperber
Official Court Reporter
District of Connecticut

A-42.

1 BY MR. ROTHBLATT:

2 Q A little while ago you left word with the Judge's
3 law clerk, who said you wanted to talk to me?
4

5 A Right.

6 Q And I called you, and you said come right down?

7 A Right.

8 Q Okay, Dan, what would you like to tell me?

9 A See, when this first happened they had just
10 recently given me thirty years, and --

11 Q Excuse me, Dan. Why don't you bring that chair
12 over, and let's you and I make ourselves comfortable.

13 Go ahead now. You'll be a little bit more
14 comfortable.

15 A So naturally I was upset and I was mad at the
16 world. If they'd asked me at the time to say something
17 about anybody, I probably would have, because I was that
18 mad at people.

19 And everybody had been feeding into my mind that
20 Mr. Grasso was the cause of me getting this time.

21 And naturally I was angry at them. So they
22 snouted a lot of questions at me, and I don't know half
23 of what they asked me, and I'd say yes. Because I didn't
24 write anything; they wrote down.

25 Q You say "they"; who are you talking about?

A-43.

1 A I think it was a detective named Sullivan, and Mr.
2 Ray Reynolds was there, and Officer D'Onofrio.

3 Q Was that when that court reporter took down the
4 statement that you gave them?

5 A Right, in Superior Court.

6 Q Go ahead.

7 A So --

8 Q This was before the court reporter was called in,
9 or the court reporter called in after? Did they talk to
10 you before the court reporter was actually --

11 A Yes, right.

12 Q They spoke to you before?

13 A Yeah, right.

14 Q And then later on the court reporter brought in?

15 A Yes.

16 Q So they spoke to you first informally, and then
17 the court reporter brought in later?

18 A Right.

19 Q Go ahead, please continue.

20 A And so a day after I went back to prison, and --

21 Q This was, by the way, after you were sentenced?

22 A After I was sentenced.

23 Q You got your eight to thirty year sentence?

24 Go ahead.

25 A So, sometime after that Mr. Grasso was arrested for

A-44.

1 some kind of dope charge. I don't know what it's all about,
2 anyway; I had read it in the paper.

3 And then after I read it in the paper -- to my
4 knowledge now my name is mentioned in the paper, when we
5 went to court in Boston.

6 So I was subpoenaed to go to court in Boston.
7 And I was called by the Deputy Warden, and he told me I was
8 subpoenaed to go to court in Boston. And I told him I didn't
9 want to go.

10 And there was a big hassle about it, and finally they
11 told me, they say "You got to go, because you was subpoenaed
12 by a Federal Judge."

13 So finally I said okay, I'll go up there. And
14 they say "What you say up there is immaterial, but you got
15 to go."

16 So I went up there with the intentions of telling
17 them I don't want anything to do with it.

18 Q What exactly were your intentions? What did you
19 want to say? What did you want to have said?

20 A If I had -- I didn't want to get on the stand and
21 say this, but if I had got on the stand I was going to tell
22 them naturally what was given in the statement, given to
23 them on the stand, at the time I was under duress, that I
24 was under strain, and I had a lot of things on my mind,
25 and there is no telling what I said. So --

A-45.

1 Q But, Dan, were you going to tell them the truth?

2 A I was going to tell them that the statement that
3 I gave concerning Mr. Grasso, concerning drugs, was not
4 true. I was going to tell them that.

5 Q So the truth -- so tell me now what the truth is.
6 Is the truth that Mr. Grasso had nothing to do with the
7 sale of drugs to you?

8 A As far as I'm concerned, according to me, I never
9 know Mr. Grasso to deal in drugs.

10 Q So that Mr. Grasso never sold you drugs?

11 A No.

12 Q Never gave you drugs?

13 A No.

14 Q Never had any kind of dealings in drugs with you
15 whatsoever; that is the truth?

16 A Truth, yes.

17 Q So that you were going to tell them that the
18 statement that you gave to those State Police was completely
19 untrue, and that you gave it under pressure?

20 A If I was supposed to go on the stand, right.

21 Q You were telling the truth, that that statement
22 was false --

23 A Right.

24 Q -- and that the truth of the matter is you gave
25 it under pressure; is that correct?

A-46.

1 A Yes.

2 Q And the truth may be that Mr. Grasso had nothing
3 whatsoever to do to any narcotics dealings with you?

4 A Not with me whatsoever.

5 Q That's the absolute truth?

6 A That is the truth.

7 Q Go ahead. Please continue.

8 A So when they brought me back from Boston -- and I
9 forgot all about it. Then sometime after that two men from
10 the Treasury Department come to see me.

11 Q Is this Internal Revenue, or Treasury?

12 A Internal Revenue, right.

13 Q Are you speaking of Mr. Kennedy?

14 A Mr. Kennedy, and I don't recall the other gentleman.

15 Q At any rate, it was Mr. Kennedy, the man who was in
16 court?

17 A Right.

18 Q During your testimony?

19 A Right, he was.

20 Q Go ahead. Please continue.

21 A And they questioned me concerning narcotics
22 transactions that I had with Mr. Grasso, I think, at the
23 time. I don't recall too much what they really did say,
24 but I don't think anything was written out. Just questioned
25 me a lot.

A-47.

1 Anyway, sometime after that I got a visit from a
2 gentleman from --

3 Q Excuse me, Mr. Harris. Did they ask you at that
4 time anything about the statement you gave the State Police,
5 whether you had any drug dealings or narcotics dealings with
6 Mr. Grasso?

7 A You mean the two men from --

8 Q The Internal Revenue Service, Mr. Kennedy and his
9 partner.

10 A I'm not sure whether they did or not.

11 Q All right, go ahead. Continue.

12 A But sometime after that a gentleman from -- he
13 says the Federal District Attorney -- he came to visit me.

14 Q He visited you where?

15 A He first visited me in Enfield.

16 Q That's the state institution?

17 A That's right, it is.

18 Q And is that Mr. Mac Buckley?

19 A No, Mr. Mac Buckley was not on this case at the
20 time. Not now.

21 Q All right, it was some other Assistant U.S.
22 Attorney?

23 A Right, right.

24 Q Do you know his name?

25 A Mr. -- he prosecute the case down in court right

A-48.

1 now. I can't pronounce the name very well.

2 Q Well, do the best you can. Try to pronounce his
3 name.

4 A Harkimere, or something like that?

5 Q Hartmere?

6 A Yeah, right.

7 Q Hartmere. The man who -- the Assistant U.S.
8 Attorney who is trying this case?

9 A Right, right.

10 Q He came to see you?

11 A He came to me.

12 Q Tell us the conversation that you had with Mr.
13 Hartmere -- by the way, when was this conversation?

14 A Well, he came to see me I think at least three
15 occasions. I don't remember the first time.

16 Q Approximately?

17 A It was sometime after the Boston case was over.

18 Q All right.

19 A I know it was after the Boston case was over.

20 Q All right. What happened? What did he say to
21 you and what did you say to him, in the first conversation?

22 A He and the assistant come in; he also had Mr.
23 Kennedy with him at the time.

24 Q Go ahead.

25 A Another gentleman from -- U.S. Attorney, the

A-49.

1 Treasury -- not "Treasury".

2 Q Internal Revenue?

3 A Internal Revenue Service. And we sat down and
4 talked and he told me he had got a copy of the statement
5 that I originally gave to Mr. F. Mac Buckley. And he says,
6 "I got it right here."

7 Q Was that statement or testimony before the grand
8 jury that he read to you?

9 A I hadn't been before -- well, I had been before
10 the grand jury with Mr. Mac Buckley.

11 Q Yes, you had --

12 A I hadn't been before with him.

13 Q No, that's what I mean. Was he reading the
14 testimony that you gave before the grand jury with Mr.
15 Mac Buckley?

16 A I'm not sure of that.

17 Q At any rate, there was some kind of statement?

18 A Right.

19 Q Whether it was the testimony or some other
20 statement, you don't remember?

21 A No.

22 Q All right. Tell us what happened. What did he
23 say and what did you say?

24 A He asked me if I would be willing to go before
25 the grand jury and repeat some of the things that was in

A-50.

1 that statement, that original statement that I had given
2 before the grand jury to Mr. Mac Buckley -- that I had
3 given to Mr. Mac Buckley, anyway.

4 Q Go ahead.

5 A And I said what would I have to repeat?
6 And he says, "I just want you to repeat certain things
7 in there."

8 He gave me a statement -- some kind of statement
9 he had wrote up or something.

10 Q He had written out a statement?

11 A He said they had been taken from that original
12 statement.

13 Q Go ahead.

14 A And a little while after that they called me
15 before the grand jury.

16 Q Now, what did you say to Mr. Hartmere at the time
17 when he asked you that?

18 A When he asked me if I would, I told him I would go.

19 Q And did he tell you specifically what statements
20 that he was interested in? Was he interested in the
21 statement that you gave, that you and Mr. Grasso supposedly
22 had drug dealings?

23 A He was primarily interested in that.

24 Q And what did you say? You said you would repeat
25 that statement?

A-51.

1 A I said I would repeat that statement.

2 Q Now, let me ask you this, Mr. Harris: that

3 statement, was that true or false, that you had drug

4 dealings with Mr. Grasso?

5 A It was the same original one that I gave from

6 first -- it was not true. The same one.

7 Q It was false, the fact that you had dealings --

8 A The whole thing was false.

9 Q You never had dealings --

10 A Never.

11 Q -- with Mr. Grasso with drugs?

12 A No kind of dealings with Mr. Grasso with drugs.

13 Q Go ahead.

14 A So, anyway, they subpoenaed me and I went before

15 the grand jury and they gave me a statement to read before

16 I went before the grand jury.

17 Q Do you recall what that statement said or what it

18 was? Was it the grand jury testimony that you gave before

19 Mr. Mac -- that you had given when Mr. Mac Buckley questioned

20 you?

21 A Some of it was in there. Some of the things that

22 he had gave me to read over before I went before the grand

23 jury was almost the same things from the first statement.

24 Q That Mr. Mac Buckley -- questions and answers?

25 A Right.

A-52.

1 Q Questions and answers that you gave?

2 A Right.

3 Q Go ahead. He had you read it?

4 A Had me -- yeah, I read it, right.

5 Q And what did he say to you? What did he say to
6 you after you read it? Or before -- tell me what he said
7 to you before you read it and after you read it.

8 A He said, "I want you to read this and try to
9 memorize as much as you can, so when you go before the grand
10 jury, try to memorize as much as you possibly can from this."

11 So they called me in there. He asked me certain
12 questions that was in there, and I answered some of them.
13 I just answered some questions.

14 Q Well, did he ask you the same questions? "Did you
15 have dealings with Mr. Grasso? Did you sell him drugs?"

16 A Yes.

17 Q And substantially what you asked --

18 A He asked me if I ever had any dealings with Mr.
19 Grasso pertaining to drugs.

20 Q And you answered of course yes you did?

21 A Yes, I did.

22 Q And when you answered that, was that true or false?

23 A No, it was not true.

24 Q That was false?

25 A Right.

A-53.

1 Q In other words, you misstated the facts? The
2 truth is that you never --

3 A No, no.

4 Q -- had dealings with Mr. Grasso on drugs?

5 A No, no, no, under no circumstances.

6 Q That's the truth?

7 A That's the truth.

8 Q Go ahead, Mr. Harris.

9 A So, after I left the grand jury and went back to,
10 you know, starting back to prison, and he came to see me
11 again.

12 Q Who came to see you again?

13 A Mr. Harkimere.

14 Q Mr. Hartmere?

15 A Yes.

16 Q That's the Assistant U.S. Attorney who is on this
17 case?

18 A Right.

19 Q Go ahead.

20 A He came to me again, and he had Mr. Kennedy with
21 him again. And he says the indictment -- I think he said it
22 was an indictment -- anyhow, I know he said -- either he
23 said he gonna indict, or he had indicted, and the case would
24 be coming up sometime in November. Sometime October or
25 November.

So he says he wants me to come to court to testify

A-54.

1 when the case comes up.

2 So he says we'll talk about a few things. Asked
3 me when I was up for parole and I told him. And I asked him
4 if he'd write a letter to the Parole Board for me and he said
5 he would. And he did.

6 And when I went before the Parole Board -- naturally
7 I made it any way.

8 Q The Parole Board granted you parole?

9 A Right.

10 Q When are you going to be released, Mr. Harris?

11 A Supposedly next month.

12 Q Oh, good, good.

13 A Yes. So just before I came to court to testify they
14 came up again.

15 Q You mean the other day?

16 A Right, they came up again.

17 Q When you say "they", who came up to see you again?

18 A Mr. Kennedy, Mr. Harkimere.

19 Q When did they come to see you?

20 A Enfield Correctional Institution.

21 Q When was that?

22 A The last time.

23 Q Yes.

24 A I think it was Tuesday before I went to the trial.

25 Q Went to the trial?

A-55.

1 A Before the trial started. Before I went to court,
2 anyway. He sat down and he gave me a statement -- he gave
3 me a statement, a paper, you know, a statement to read.

4 Q Well, was that a handwritten statement that Mr.
5 Kennedy had written out, or was it a transcript of testimony
6 that you had previously given? Do you know?

7 A It was a transcript -- it was the one that he showed
8 me in court that day, the one I had in court that day.

9 Q You mean when you testified?

10 A That's right.

11 Q I don't remember --

12 A It wasn't the original one, anyway. It was the
13 one that he asked me about before the grand jury.

14 Q Well, was it a transcript, questions and answers?

15 A Yes, it was.

16 Q It was a transcript; it was questions and answers?

17 A Right, yes.

18 Q It was the same thing you say that he showed you
19 in court the other day?

20 A Right.

21 Q You don't know whether that was a transcript of
22 the grand jury minutes you gave when Mr. Hartmere questioned
23 you, do you? Or do you?

24 A No, I don't.

25 Q Might it have been that?

A-56.

1 A It could have been or could not have been.
2 I don't know.

3 Q Or it might have been the transcript of the
4 testimony you gave when Mr. Mac Buckley questioned you?

5 A It could have been. I don't know.

6 Q It could have been either one of them?

7 A Right.

8 Q Go ahead. Then what happened? What did he say;
9 what did you say?

10 A So when I got to court, when they got me down
11 in court I told the marshal that I'd like to see either
12 the prosecutor or somebody there -- it was very important I
13 talk to him.

14 So Mr. Kennedy came down and --

15 Q Excuse me, when did this happen? Try to place
16 the time. The date again?

17 A The morning I went to court.

18 Q Oh, this was the morning you went to court and
19 gave testimony?

20 A Right.

21 Q Go ahead.

22 A So another fellow came down and said he was --
23 I don't know his name. He said he was from their office.

24 So I told him that I'd like to speak to somebody.
25 He said, "What's it about?"

A-57

1 I said "It concerns me testifying, because I'm
2 not going to testify; I don't want to testify; I don't want
3 nothing to do with this."

4 So he says, "Well, wait a minute", and he left. And
5 pretty soon Mr. Kennedy came back. So he says, "What's this?"

6 I said, "Listen, I'm not going to testify; I'm not
7 going to do this."

8 Q Did you tell him why you didn't want to testify?

9 A I didn't tell him. Not him at that time.

10 Q Go ahead, continue.

11 A He says "What do you mean?"

12 I says, "Just what I said", I says "I'm not going
13 to testify, that's all."

14 He said, "Well, do you know if you don't that we
15 will hit you with perjury and make you go back to prison and
16 do the rest of the thirty years you got to do?"

17 I said, "What?"

18 He says, "I will see to it that you'll get hit
19 with perjury, and we'll see you go back to prison, and
20 your parole will be violated and revoked, and you'll have to
21 do the rest of your thirty years."

22 So I said, "Well, I'll have to take my chances."

23 So a little while after Mr. Hartmere come in.

24 Q Where did this conversation take place?

25 A That was in the lock-up there.

A-58

1 Q In the Marshal's lock-up, in the Federal Court-
2 house?

3 A Right.

4 Q Go ahead. Please continue.

5 A So he came out and I told him I didn't want to
6 go on the stand.

7 Q You told Mr. Hartmere?

8 A Right.

9 Q What did you say to Mr. Hartmere?

10 A I said "I don't want to be the cause of
11 damaging your case. I don't want to be the cause of
12 doing anything. I just don't want to go on the stand.
13 I don't want no part of it."

14 So he says, "You know you can be hit with perjury?"

15 I said, "Well, I've been threatened already by
16 Mr. Kennedy; he told me that I'd be forced to go back on
17 Parole violation -- my parole would be revoked and I'd be
18 forced to do my other thirty years."

19 I said "He told me this already", I said, "I
20 don't understand this."

21 So he says "Well, you could be hit with perjury."
22 And Mr. Hartmere, he told me, he says, "Well, you got to
23 go on the stand. All I can tell you is to tell the truth."
24 He say "You got to go on the stand." That's what he
25 told me.

A-59.

1
2 So when I got on the stand --

3 Q Excuse me, Mr. Harris. Did you say to him at
4 that time the truth is that Mr. Grasso had nothing to do
5 with narcotics dealings with you?

6 A I don't recall. I don't think I said anything --
7 concerning -- I don't recall that.

8 Q Okay, continue. Please continue.

9 A When I got on the stand and I was sworn in, I
10 requested to speak to an attorney.

11 Q Yes, I know. You said you wanted to confer with
12 a lawyer. Go ahead, please continue.

13 A So the judge granted me that. So when I went
14 back the bullpen over there, a little while later this
15 lawyer came to talk to me. Called me out of the cell.
16 And I told him, I said, "Listen", I said, "I don't want
17 to go on the stand. I don't want to testify."

18 He said "Why?"

19 I said "Because most of the things that I said
20 in the statement are not true." I says "I'm not going on
21 the stand and repeat them, because I don't feel it's
22 right."

23 So he says, "Well, the only thing I can tell you,"
24 he says, "how it will go. I'll look into it and find out
25 a little more about it."

A-60.

1 And he came back a little while later and he told
2 me that I could be charged with perjury, and my parole
3 could be revoked if I didn't testify.

4 Q If you did or did not?

5 A If I didn't.

6 Q If you did not testify?

7 A Right.

8 Q He said you could be charged with perjury --

9 A Right.

10 Q -- and your parole would be revoked if you did
11 not testify?

12 A That's right.

13 Q That's what he told you?

14 A That's what he told me.

15 Q So what did you say?

16 A So I told him, "I don't understand that." I says
17 "I don't feel that's right."

18 So he says, "Well, let me go and check into
19 something else, and see if there's any legal grounds as
20 far as" -- he said he was concerned about if the State could
21 charge me with any kind of dope transactions that I had
22 spoken about it in the transcript.

23 But in the meantime he came back with Mr. F. Mac
24 Buckley, and Mr. Buckley came in and Mr. Buckley told me,
25 he said, "Listen," he says, "they (can't) charge you with
(can)"

A-61.

perjury."

I said, "Well, Mr. Mac Buckley, I don't want to go on the stand when we went to Boston; I tried to make it clear to you I didn't want to go to Boston." I said "Now they took some things from the same statement and they're trying to get me to go on the stand to testify to things, and I don't want to do it."

Q Did you tell him why you didn't want to do it? Did you say you didn't want to do it because it would be a lie?

A I told the lawyer, that what I said was not right, was not true. I told that to him.

Q Did you say that to Mr. Mac Buckley?

A No, I didn't.

Q Please continue.

A I did say that to the lawyer.

Q You did say it to the lawyer?

A I did say it to him.

Q Go ahead.

A So Mr. Mac Buckley told me they would finally figure out a way where I didn't have to testify, you know, like take the Fifth or something like that.

Q Who said that, Mr. Mac Buckley?

A Yes.

Q Go ahead. Please continue.

A-62.

1 A So he says, "Are you afraid?"

2 I said "Of course I'm afraid."

3 So he said, "Well, I want you to explain this to
4 the judge, so that this will not hit the press, and explain
5 to him why." He says, "I want you to go out there and
6 testify and I'll see to it that it won't get in the papers."

7 Q The lawyer said that to you?

8 A He said, "I'm going to speak to the judge."

9 Q Go ahead.

10 A "Speak to your Honor and see if this can't be
11 kept out of the paper."

12 Q Oh, I see.

13 A I think this is when that question came up.

14 Q Go ahead, please continue.

15 A And I said, "Well, if it means that my parole
16 got to be revoked, and I got to go back to prison, then
17 I ain't got no choice but to testify."

18 So when I got on the stand I asked the Court --
19 now you didn't ask me what the conversation, definitely,
20 the conversation I had when I wished to speak to a lawyer --
21 because if you had, I would have told the truth right then.

22 Q Well, you see, I'm not permitted to invade the
23 attorney-client privilege. Your lawyer -- I can't ask any
24 more than if you were my client, whatever you told me as
25

A-63.

1 your lawyer -- I'm not your client. I'm interviewing you
2 now. You understand --

3 A Right, right.

4 Q -- for Mr. Grasso. So I have a right to talk to
5 you for Mr. Grasso's purpose.

6 A Yes.

7 Q But assuming that I were your lawyer --

8 A Yes, right.

9 Q -- I can't ask you what conversations you had in
10 confidence with your lawyer. It would be improper. You
11 have a right to talk to a lawyer and to be absolute -- and
12 to feel that that lawyer is going to keep it in secret.

13 I have no idea. I couldn't get the lawyer to
14 tell me what you said. I can ask you what you told
15 anybody, but not your lawyer.

16 A Oh, I see. I wasn't aware of that.

17 Q Because a person has a right to talk freely and
18 honestly to his lawyer.

19 A Well --

20 Q That's why I was asking you every other question,
21 except what you told your lawyer.

22 A Yes.

23 Q It would not be right, I didn't feel, for me to
24 ask you what you told your lawyer.

25 Go ahead, please continue.

A-64.

1 A I want this perfectly understood, that no one
2 threatened me or caused me, you know, to call you. It is
3 just that it's been bothering me, and I know it's not
4 right, and I'm not that smart, and I don't feel it's right.

5 Q What isn't right, Mr. Harris? Would you explain
6 in your own words how you feel? You say it's not right.

7 A It was not right for me to go to court and back
8 up the statement that I had gave (unclear) original.
9 And it was not true. And the reason I got the (unclear) on
10 that statement, because I had thirty years and I was very
11 depressed and I would have said probably -- on anybody, no
12 matter who it was.

13 Q You would have implicated the judge, or me, or
14 anybody else if you could get out of jail; is that right?

15 A Well, it was not so much getting out of jail.
16 I wanted to get out of jail, true, but also the fact that
17 everyone that was telling me all along that Mr. Grasso was
18 the cause of me being in there and getting thirty years.

19 Q Oh, I see. You were mad at him because they said
20 he was responsible?

21 A That's why I wasmad.

22 Q You were mad at him, particularly?

23 A Yes, I was.

24 Q So that you were prepared to say anything that
25 anybody suggested to you?

A-65.

1 A Whatever they suggested, I went along with it.

2 Q Now, what you are telling me now, Mr. Harris, I
3 want to understand. You're saying that nobody since you
4 testified in court has approached you and spoken to you
5 about this matter; is that correct?

6 A No one has threatened me or anything.

7 Q Or approached you or spoken to you about it?
8 Am I the first person who has talked to you about this
9 matter since you testified in court?

10 A Well, the prosecutor, they came out and say I
11 did a good job.

12 Q The prosecutor said you did a good job? They
13 said you were a good witness?

14 And after you left the courthouse did anybody
15 speak to you about your testimony?

16 A No, no one, no one, no.

17 Q So that I am the first person who is speaking to
18 you about the testimony that you gave in court the other
19 day?

20 A Yes. I called up -- called Bart on the phone,
21 Mr. Grasso's son.

22 Q Yes.

23 A And he said -- I told him who it was, and he
24 says "I don't want to talk to you."

25 I said, "Well, I just want you to relay a message

A-66.

1 to your father or his attorney. And he advised me to call
2 the courtroom and try to get in touch with you, you know,
3 to tell you.

4 Q So this afternoon you telephoned the courtroom,
5 is that right?

6 A Right.

7 Q And do you remember speaking to Judge Clarie's
8 law clerk, and at 4:55? Did you call at 4:55?

9 A Yes, I did, I did.

10 Q And did you give him this message -- did you
11 say to Mr. -- Judge Clarie's law clerk, "Please call Dan.
12 It's very important. 728-9686"?

13 A I did.

14 Q And that message you asked Judge Clarie's law
15 clerk to deliver to me?

16 A Yes, to deliver to you, I did.

17 Q And after some time a little after five o'clock,
18 did I then call you, following this message?

19 A Right, right, you did.

20 Q And you told me that you were Dan Harris --

21 A Right.

22 Q -- and that you'd like to talk to me; is that
23 right?

24 A I did.

25 Q And did I suggest to you that perhaps it would

A-67.

1 be a good idea that I come down to the jail and talk to
2 you in person?

3 A You did.

4 Q And here we are, chatting, following your
5 telephone call?

6 A Right.

7 Q That you delivered to the law clerk, to get to
8 me?

9 A Right, right.

10 Q Now, Mr. Harris, you and I are speaking here alone.
11 Mr. Grasso is not here; there is nobody but just the two
12 of us?

13 A Nobody but you and I.

14 Q There is nobody around here threatening you?

15 A No, no, no.

16 Q I don't have anything --

17 A I'm sitting right in jail here.

18 Q You're sitting in jail here, and I don't have
19 any weapons on me?

20 A No, no.

21 Q And I'm not putting any -- by the way, did I
22 say anything to you before I turned this tape recorder on,
23 other than just "hello"?

24 A That's all.

25 Q And I immediately turned this tape recorder --

A-68.

1 A And immediately turned this tape recorder on.

2 Q And that tape is still going right now?

3 A Yes, right, it is.

4 Q Is there anything -- any question in your mind
5 that every time you told either the police or the U.S.
6 Attorney or the grand jury or the representatives of
7 the Internal Revenue Service, that you had drug dealings
8 with Mr. Grasso, that that was completely untrue and
9 false?

10 A No, it's no question in mind about it. I know
11 for a fact it's not true.

12 Q It never happened?

13 A It never happened, no.

14 Q So what you are telling me now is that the
15 testimony that you gave in court the other day is completely
16 untrue?

17 A Concerning the drugs, it's untrue.

18 Q Now, when you testified that you had drug
19 dealings with Mr. Grasso, that was completely untrue?

20 A Completely untrue.

21 Q You only gave that testimony because of the
22 reasons you just described to us?

23 A That's true.

24 Q That's the reason you gave that testimony?

25 A That's correct.

A-69.

1 Q And it's your testimony that you told the
2 attorney who conferred with you --

3 A I did tell him that --

4 Q Now, would you repeat again what you told that
5 attorney?

6 A When we first sat down in the office to talk he
7 said, "What is the reason for this?"

8 And I said, "Well, the main thing is, what I said
9 concerning Mr. Grasso, concerning drugs, was not true."

10 So that's what I told him.

11 Q And what did he say to you again?

12 A Well, he said a few things. I don't recall just
13 everything he said.

14 Q Well, in substance do you recall what he said?

15 A He said the reason that -- "the main reason for
16 not wanting to go on the stand against Mr. Grasso is
17 because the statements you gave are not true?"

18 I said "That's correct."

19 So he said, "Do you know you'll be liable to be
20 charged with perjury?"

21 Q And what did you say?

22 A I said, "Well, if that's the case, it's just
23 going to have to be, because I'm just telling it like it
24 is. That's the truth, and I don't want to go on the
25 stand." I said, "I have been threatened already by Mr.

A-70.

1 Kennedy." I said "The fact just you and me here, I just
2 don't want you to do this."

3 Q You told this attorney that Mr. Kennedy, the
4 Special Agent of the Internal Revenue Service, has threatened
5 you in order for you to testify?

6 A He told me that if I didn't testify that I
7 would be charged with perjury, and I would be sent back
8 to prison for the remainder, and my parole would be
9 revoked, and I would remain and do the rest of the thirty
10 years.

11 Q That's what Mr. Kennedy told you?

12 A Right.

13 Q Did you tell Mr. Kennedy, "Look, Mr. Kennedy, what
14 I said about Mr. Grasso is untrue. I don't want to lie"?

15 Did you tell that to him?

16 A I can't recall repeating that to him. I can't
17 recall saying that.

18 Q Well, at any time did you tell him that what you
19 had said about Mr. Grasso was untrue?

20 A No, I don't recall saying it to either one of them,
21 other than the lawyer. That's the only one I talked to.

22 Q What did you say to Mr. Kennedy? Tell me in your
23 own words what you said to Mr. Kennedy.

24 A I told him, I says, "I don't want to go on the
25 stand and repeat what I said in this statement."

A-71.

1 So he says, "What do you mean, you don't want to
2 repeat this thing? You mean to tell me that we got this
3 case, we did all this work on this case, and prepared you
4 for this case, and now you are going to tell us --"

5 Q "Prepared you for this case"? Is that what you
6 said? I'm sorry.

7 A I think that's what he said.

8 Q Go ahead, I'm sorry; I just didn't hear the word
9 you used.

10 A He said, "And now you're telling me that you don't
11 want to go on the stand and testify?"

12 I said, "That's right, I don't."

13 H e said, "Well, if you don't, you know, you are
14 going to be charged with perjury, and you are going back
15 to prison, and you're going to do the rest of that thirty
16 years you owe."

17 That was his words.

18 Q Are you telling me now, Mr. Harris, that that is
19 the only reason that you got on the stand and testified
20 the way you did?

21 A That's the only reason, because I was afraid they
22 was going to do just what they said, and I did enough time
23 in prison, and I was scared to go back.

24 Q Now, what's your feeling now? You realize now
25 that I'm going to have to call this to the attention of the

A-72.

1 Court?

2 A Right, right.

3 Q That I'm going to have to call to the attention
4 of the Court all that you just said?

5 A Right.

6 Q In fact, I'm going to ask the Court to listen to the
7 tape of our conversation.

8 A Right, right.

9 Q And are you prepared to face whatever consequences
10 follow from your telling the truth?

11 A Well, whatever follows, follows. I had to tell
12 you the truth, because it kept bothering me, and I just
13 couldn't live with it.

14 Q In other words, you feel now that you are a
15 man of conscience; you don't want to hurt a person, say
16 something that's untrue, and continue to repeat a lie and
17 hurt an innocent man?

18 A I do not.

19 Q And is there any question in your mind that
20 Sylvio Grasso has had absolutely nothing to do with any
21 narcotics dealings with you, or to your knowledge?

22 A He has never had any kind of dealings with me
23 in narcotics, none whatsoever.

24 Q And that's the truth?

25 A That is the truth.

A-73.

1 Q And you don't want to go on living with your
2 conscience, that you lied to put a man, an innocent man
3 in jail?

4 A I don't want to feel that I had anything to do
5 with putting anybody in jail by lying.

6 Q And you want to correct that injustice?

7 A I do.

8 Q Well, Mr. Harris, I'm very grateful to you.
9 I think you are a fine man. I think it takes a great
10 man to realize when he makes a mistake.

11 We're all fallible human beings. We all make
12 mistakes. None of us are perfect.

13 And it is the real man who when he makes a mistake
14 faces up to it. And I think a real decent human being
15 certainly would not want to see an innocent man hurt and
16 put in jail.

17 And I think the fact that you want to face up
18 to that at this time and take whatever consequences, shows
19 that you are a fine human being.

20 And I congratulate you.

21 All I can tell you is I have the greatest
22 admiration and respect for you.

23 A Thank you.

24 Q I think that you have shown, in my judgment all
25

A-74

1 of the symptoms and examples of a fine human being.

2 You realize that you were taken advantage of, and
3 you weren't going to capitalize and cause another human
4 being to be unjustly convicted --

5 A Right.

6 Q Because you might get some benefit from it.

7 A That's right.

8 Q Isn't that really what this was all about?

9 A That's what it was all about.

10 Q Well, thank you very much, Mr. Harris. And you
11 appreciate I'm going to call this to Judge Clarie's
12 attention, and obviously I can't have anything to do with
13 helping you in your legal matters, but anyway that I can
14 be of any help in seeing that you are fairly treated for
15 showing the kind of decency that you've shown now, I'm
16 certainly going to help.

17 Because I think it's a great person who realizes
18 when he makes a mistake, and will not be a party to an
19 injustice -- and whoever it hurts.

20 A Right.

21 Q And you agree with me?

22 A I agree with you.

23 Q Thank you very much. Is there anything else
24 that you want to tell me now, Mr. Harris, before I leave?

25 A The only thing I could say is I'm sorry that,

A-75.

1 that this happened.

2 Q Well, don't be sorry that it happened. It's not
3 beyond repair. would be beyond repair if Mr. Grasso were
4 convicted because of the false testimony that you were
5 compelled to give --

6 A Right.

7 Q -- and that false testimony were permitted to go
8 uncorrected.

9 A Right.

10 Q Fortunately, we can correct that injustice, I
11 believe, and I'm almost certain that we can correct that.
12 And I'm sure that Judge Clarie will not permit this kind of
13 an injustice to be committed.

14 A I hope not.

15 Q Well, thank you very much.

16 Is there anything further that you want to tell
17 me?

18 A No, that's all I got to say.

19 MR. ROTHBLATT: Thank you very much.

20 That concludes the conversation that has taken
21 place between Mr. Daniel Harris and myself here
22 at the Seyms Street Jail.

23 And it is now six minutes after six, according
24 to my watch.

25 Q Is that correct?

A-76.

1 A That's right.

2 MR. ROTHBLATT: Thank you, Mr. Harris.

3
4
5
6
7
8
9
10
11 C E R T I F I C A T E

12 I hereby certify that the foregoing is a true and
13 correct transcript of Court Exhibit G, according to
14 my interpretation of the hearing thereof, and to
15 the best of my ability.

16
17
18 Elliott Sperber
19 Official U.S. District Court
Reporter for the District
of Connecticut.

20 November 23, 1975.

21
22
23
24
25
A-77.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA :
v. : CRIMINAL NO. H-75-52
SYLVIO J. GRASSO, :
Defendant :
:

MEMORANDUM IN SUPPORT OF DISMISSAL
OF INDICTMENT ON GROUND OF DOUBLE
JEOPARDY

Facts

This is a tax evasion case involving alleged violations of 26 U.S.C. § 7201 for the years 1969, 1970 and 1971. The Government relies upon the net worth method of proof, and during its direct case called as a witness one Daniel Harris, a convict serving an 8 to 30 years sentence for narcotics violations, to establish that defendant Grasso received unreported income through dealings in narcotics.

On the final day of testimony of the approximately two-week trial, after the defense had rested, Daniel Harris telephoned the Courthouse and left a message for defense attorney Henry Rothblatt to contact him immediately. Attorney Rothblatt called Harris, who was then at the Seymes Street Jail, and at Harris' request, went to see him.

At the jail Harris and Attorney Rothblatt had a conversation which was tape recorded with Harris' knowledge and consent. Harris stated that the testimony he had given at the trial--to the effect that he and defendant Grasso had narcotics dealings--

19/1

A-78

was totally false and perjurious. He also said that prior to testifying at the trial he told IRS Agents and the Assistant U.S. Attorney that he did not want to testify, and that the Agents told him if he did not testify he would be charged with perjury, his parole would be violated, and he would be required to serve the remainder of his 30 year sentence.

(When Harris initially took the stand at the trial he requested to speak with an attorney. An attorney was provided, and at that time Harris told the attorney the reason he did not want to testify was that the testimony he had given before the Grand Jury, which the Government wanted him to repeat at trial, was untrue. It was only after Harris spoke with the IRS Agents, the Assistant U.S. Attorney, and Mr. F. Mac Buckley [a former federal prosecutor who prosecuted defendant Grasso in a 1973 narcotics case which resulted in an acquittal, and who is named as a defendant in a pending civil rights action brought by Grasso] that he agreed to testify).

During his tape recorded conversations with Henry Rothblatt, Harris repeatedly stated that he was speaking freely and voluntarily, that no one had told him to contact Mr. Rothblatt, and that he was not in any manner threatened or coerced into recanting his trial testimony.

The tape recording of Harris' recantation was filed as an exhibit and played for the court in chambers. Thereafter an evidentiary hearing was held outside the presence of the jury with regard to the circumstances surrounding Harris' initial refusal to testify, his change of mind, and his eventual recantation. Harris was called as a witness at the hearing, but he refused to testify, claiming Fifth Amendment privilege.

At the conclusion of the hearing, defendant Grasso moved for dismissal of the indictment on the ground of prosecutorial

misconduct surrounding the perjurious testimony of Daniel Harris. The Court denied the motion, and then, after stating that Daniel Harris "couldn't be believed if he put his hand on two Bibles-- I wouldn't believe him under any circumstances . . . ," the Court sua sponte declared a mistrial. This was opposed by both the Government and the defendant.

Argument

In its traditional application, double jeopardy, is a rule of finality: a single fair trial on a criminal charge bars reprosecution. Double jeopardy shares the purposes of civil law rules of finality; it protects the defendant from continuing distress, enables him to consider the matter closed and to plan ahead accordingly, and saves both the public and defendant the cost of redundant litigation. But double jeopardy is not simply *res judicata* dressed in prison grey. It was called forth more by oppression than by crowded calendars. It equalized, in some measure, the adversary capabilities of grossly unequal litigants. It reflects not only our demand for speedy justice, but all of our civilized caution about criminal law - our respect for a jury verdict and the presumption of innocence, our aversion to needless punishment, our distinction between prosecution and persecution. . . .

Note, *Twice in Jeopardy*, 75 Yale L.J. 262, 277-279 (1965).

In *Green v. United States*, 355 U.S. 184, 187-188 (1957), the Supreme Court wrote the following about the underlying purpose of the double jeopardy prohibition:

The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Since United States v. Perez, 9 Wheat-579, 6 L.Ed. 165 (1824), the standard for determining when the Fifth Amendment precludes retrial following the declaration of a mistrial without the defendant's consent is "manifest necessity":

We think, that in all cases of this nature, the law has invested Courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances, which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes. . . .

Id., at 580, 6 L.Ed. 165.

As more recently emphasized by Mr. Justice Douglas, the discretion to discharge the jury before it has reached a verdict "is to be exercised 'only in very extraordinary and striking circumstances,'" and any doubt must be resolved "in favor of the liberty of the citizen. . . ." Downum v. United States, 372 U.S. 734, 736, 738 (1963).

Turning to the present case, and following the analysis of the Court of Appeals in United States v. Glover, 506 F.2d 291 (2d Cir. 1974), in the first instance it cannot fairly be said that the mistrial was granted for the benefit of defendant Grasso. The true beneficiaries were Daniel Harris on the one hand, and the Government on the other.

A major cause of the mistrial was Harris' refusal to testify following his recantation to Henry Rothblatt. This refusal, based upon Fifth Amendment privilege against self-incrimination, clearly was for the benefit of Harris--not defendant Grasso. See United States v. Jorn, 400 U.S. 470, 482-483 (1971); McNeal v. Hollowell, 481 F.2d 1145 (5th Cir. 1973). (We note, in addition,

that it is doubtful that Harris was actually in a position to properly plead the Fifth Amendment. According to the Government, following his recantation, Harris reversed himself again and claimed his Grand Jury and trial testimony were untruthful. Since only these statements, and not the recantation, were given under oath, Harris would not be incriminating himself by testifying that they were true and that he had lied in the conversation with Attorney Rothblatt).

Notwithstanding that "for the record" the Government "strongly oppose[d]" the mistrial, (after it was a fait accompli), the Government also clearly benefited from the Court's ruling. For not only had one of their principal witnesses recanted his trial testimony and proven himself to be totally incredible, but also, in relating the circumstances surrounding how he was induced to testify, he supplied the defense with strong evidence of prosecutorial misconduct, which, if placed before the jury, would have severely damaged the Government's case. The granting of a retrial now gives the Government a fresh start. They now have the opportunity either to reconstruct their case without Harris, or, even if they do elect to use him again, they could do so and be free of much of prejudicial material contained in the tape recording.

A somewhat similar situation arose in McNeal v. Hollowell, supra, where in a murder prosecution one state witness gave testimony which the prosecutor neither wanted nor expected, and another surprisingly pleaded the Fifth Amendment. (In a way, Harris did both in the present case). In holding that it was error to grant a nolle prosequi (which the court equated with a mistrial), the court wrote:

We conclude that no manifest necessity and no ends of public justice required the granting of the nolle prosequi in McNeal's first trial. The

prosecutor's uncomfortable position was caused by nothing more unusual than his reliance on a vacillating witness and on one whose testimony he had not sufficiently insured would be forthcoming. Ross, acting within this authority and professional responsibility, did no more than point out what at that time was a weakness in the presentation of the State's case. We hold that the granting of the nolle prosequi in order to allow the State an opportunity to shore up that weakness violated McNeal's Fifth and Fourteenth Amendment rights.

481 F.2d at 1152.

A second factor mentioned in United States v. Glover, supra, was that the defendant had nothing to do with the circumstances which caused the mistrial. (506 F.2d at 297-298). Certainly the same is true here.

Another factor emphasized in Glover was that in granting a mistrial without the defendant's consent, the court deprived the defendant of his right to seek a favorable verdict from the jury that was empaneled. The court also distinguished Glover from those cases where a mistrial was granted at a point when no evidence had yet been presented. (505 F.2d 298). Similarly, in the present case, the trial had virtually been complete at the time it was aborted. (Also noteworthy in this regard, and prejudicial to defendant Grasso, is the fact that he testified extensively at his trial; this can only aid the Government in its efforts to impeach him at a retrial).

Another important consideration in determining whether the granting of a mistrial is a "manifest necessity" is the existence of alternatives. See Illinois v. Somerville, 410 U.S. 458, 481 (1973) (Marshall, J., dissenting); United States v. Kin Ping Cheung, 485 F.2d 689, 691 (5th Cir. 1973) (citing United States v. Jorn, 400 U.S. 470 [1971]). Here there were several.

Harris could (and should) have been recalled for further cross-examination before the jury. As indicated above, he had no basis for claiming Fifth Amendment privilege if he intended to

return to his original story. Moreover, even if he did have a right to refuse to answer questions on the ground of self incrimination, the defendant at least had the right to have this done before the jury. See Shushan v. United States, 117 F.2d 110 (5th Cir. 1941); United States v. Stephens, 492 F.2d 1367 (6th Cir. 1974). Alternatively, Harris could have been granted immunity with regard to possible perjury. See United States v. Spinella, 506 F.2d 426, 432 (5th Cir. 1975).

Another alternative, in view of Harris' refusal to testify on Fifth Amendment grounds, would have been to admit the tape recording of his recantation in evidence under Fed. R. Evid. 804 (a) (1), (2) and 804(b) (3), (5).

And still another alternative would have been to strike the testimony Harris had previously given with appropriate instructions. See United States v. Cardillo, 316 F.2d 606 (2d Cir. 1963); Fountainhead v. United States, 384 F.2d 624 (5th Cir. 1967); United States v. Newman, 490 F.2d 139 (3d Cir. 1974).

In Illinois v. Somerville, 410 U.S. 458 (1973), the Supreme Court noted that a factor which militates in favor of granting a mistrial is an error occurring at trial which makes ultimate reversal on appeal "a certainty":

. . . it would not serve "the ends of public justice" to require that the Government proceed with its proof when, if it succeeded before the jury, it would automatically be stripped of that success by an appellate court.

410 U.S. at 464.

Certainly nothing occurred in the present case to justify such a conclusion. Here unusual developments took place outside the jury's presence, and as indicated above, there were several ways to cope with them without introducing reversible error. Under

such circumstances, there was simply no justification, at such a late stage in the trial, for taking away the defendant's opportunity for a favorable verdict.

[W]here the judge, acting without the defendant's consent, aborts the proceeding, the defendant has been deprived of his "valued right to have his trial completed by a particular tribunal." See Wade v. Hunter, 336 U.S., at 689, 93 L.Ed., at 978.

If that right to go to a particular tribunal is valued, it is because, independent of the threat of bad-faith conduct by judge or prosecutor, the defendant has significant interest in the decision whether or not to take the case from the jury when circumstances occur which might be thought to warrant a declaration of mistrial. . . . the Perez doctrine of manifest necessity stands as a command to trial judges not to foreclose the defendant's option until a scrupulous exercise of judicial discretion leads to the conclusion that the ends of public justice would not be served by a continuation of the proceedings. . . .

United States v. Jorn, 400 U.S. 470, 484-485 (1971) (footnotes omitted).

Conclusion

In 1973, Sylvio Grasso was brought to trial on federal narcotics charges in the District of Massachusetts and acquitted. Earlier this year he was prosecuted in the Connecticut Court of Common Pleas on conspiracy and larceny charges and was acquitted. He is presently facing another state prosecution for allegedly issuing bail bonds without a proper license.

For most compelling reasons, this defendant had an interest and right to have the initial complex trial of this indictment proceed to verdict. Through no fault of his that was prevented, and he now faces still another prosecution on the same charges. While the delay and retrial can serve only to strengthen and improve the Government's case, it has severely prejudiced the defendant and left him without the resources to present even an

A-85

adequate defense.

For all of the foregoing reasons, without even considering the question of whether prosecutorial overreaching is to blame for the mistrial, the issue of double jeopardy left open by Chief Judge Clarie must be resolved in favor of the defendant, and the indictment herein dismissed.

Respectfully submitted,

Henry B. Rothblatt (HBR)

HENRY B. ROTHBLATT
Attorney for Defendant
232 West End Avenue
New York, N.Y. 10023
(212) 787-7001

CERTIFICATE OF SERVICE

This is to certify that a copy of the within and foregoing Memorandum in Support of Dismissal of Indictment on Ground of Double Jeopardy has this 30th day of December, 1975, been deposited, postage pre-paid, in the United States mail, addressed to Peter C. Dorsey, Esq., United States Attorney, 450 Main Street, Hartford, Conn. 06103.

Henry B. Rothblatt (HBR)
HENRY B. ROTHBLATT

A-87.

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA

V.

SYLVIO J. GRASSO

*

*

CRIMINAL NO.: H-75-52

*

GOVERNMENT'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S
MOTION TO DISMISS INDICTMENT ON GROUNDS OF DOUBLE JEOPARDY

FACTS

Derendant has filed a Motion To Dismiss the Indictment in this case on the grounds that his retrial constitutes double jeopardy, in violation of the Fifth Amendment to the United States Constitution. On November 26, 1975, the Honorable T. Emmet Clarie declared a mistrial, sua sponte, after an extensive factual hearing on defendant's Motion To Dismiss Indictment based on prosecutorial and/or government misconduct. Trial of the defendant, on tax evasion charges for the years 1969, 1970 and 1971, had commenced on November 5, 1975 in Hartford. At the time of the declaration of mistrial the case had proceeded to the point where the Government was presenting its rebuttal case.

In proving an understatement of income by the defendant for the years concerned, the Government utilized the net worth method of proof. As a likely source of income, the Government introduced evidence that the defendant was engaged in the bail-bonding business and had various real estate and business investments. Non-taxable sources of income were negated. In addition, the Government called as a witness during its case in chief, Daniel Harris, who testified that the defendant was engaged in narcotics sales (heroin) during the year 1970. On November 20, 1975, Daniel Harris asked defense counsel, Henry Rothblatt, to meet with him. Mr. Rothblatt tape-recorded the conversation with Mr. Harris that evening at which time Mr. Harris recanted his

A-88.

trial testimony. That same evening Harris was interviewed by three federal agents at which time Harris told the agents that his conversation with Mr. Rothblatt was a complete lie and that he had been coerced into meeting and giving a statement to Attorney Rothblatt by an unknown third party. On the morning of November 21, 1975, Attorney Rothblatt's tape-recording was played for the Court in chambers with Government and defense counsel present. The Court then excused the jury and conducted a hearing on defendant's Motion To Dismiss the Indictment. During the hearing, Mr. Harris was called to the witness stand and upon advice of counsel invoked the Fifth Amendment and refused to testify. At the conclusion of the hearing, the defendant again moved for dismissal of the indictment on the ground of Government misconduct, and this Motion was denied by the Court. The Court specifically found that there was no improper conduct by either the Government agents or the prosecutors. The Court then declared a mistrial on its own Motion. The Government strongly opposed the declaration of a mistrial. The defendant, on the other hand, agreed with everything the Court had decided (apparently including the Court's specific finding of no Government misconduct), except the declaration of a mistrial and urged the Court for a judgment of acquittal. The defendant now argues that there was Government misconduct and states that the defendant opposed the declaration of a mistrial.

In declaring a mistrial, the trial Court made it clear that it was acting in the interests of the defendant, in order to assure a fair and impartial trial, specifically stating:

"The Court has, as counsel may well imagine, has given considerable thought to this problem that has arisen. I never had the question arise in this form during a trial before.

But the Court is of the opinion that because of the perjury issue injected into the trial by the testimony of Daniel Harris, that the defendant Grasso cannot get a fair and impartial trial under the present circumstances.

If the issue went to the jury it would not be whether or not he failed to pay his income taxes; the issue would be of selling narcotics, which is in and of itself a kind of abhorrent business to most every one of us. The issue

A-89.

would become whether or not he was selling narcotics, and whether or not this man, Daniel Harris, could be believed. ...

And the issue of Mr. Grasso's income tax evasion would be well lost in the question of whether or not Daniel Harris committed perjury. That would be the nub of the case, rather than the question of the defendant's failure to pay his income taxes.

For this reason the Court is of the opinion that the Motion To Dismiss would be denied, but that a mistrial should be ordered, because there is a manifest necessity for declaring a mistrial. Otherwise, the ends of justice, public justice, would be defeated.

And that is what the Court is going to do. The Court is of the opinion that to permit the trial to go forward under the present circumstances would be an injustice to Mr. Grasso."

(Transcript of Proceedings of November 26, 1975, pp. 10, 11, 12.)

ARGUMENT

It is clear that jeopardy attached when the jury was impaneled and sworn, and that the defendant is vested with a right to have his trial completed before that tribunal and jury.

Downum v. United States, 372 U.S. 734, 1963. It is also clear that while technical jeopardy attached, a defendant is not placed^{1.} in double jeopardy in all cases where a retrial takes place.

I. Retrial has been allowed where no jury verdict has been reached in the following cases:

Illinois v. Somerville, 410 U.S. 458, 1973 (defendant was brought to trial under an incurably defective indictment);

Turner v. Louisiana, 379 U.S. 466, 1965 (possible juror contamination because jury had been in custody of two deputy sheriffs who were principal prosecution witnesses);

United States v. Tateo, 377 U.S. 463, 1964 (defendant requested and obtained a mistrial);

Wade v. Hunter, 336 U.S. 684, 1949 (tactical situation of an advancing army made place of trial impracticable);

United States ex rel. Stewart v. Hewitt, 517 F.2d 993 (3d Cir. 1975) (possible jury bias because father-in-law of defendant on trial for wife's murder served as tipstaff for jury);

A-90.

In this case the trial Court acted within its permitted discretion, and the defendant may be retried. The law is clear that a mistrial may be granted by the Court even over the defendant's objection, and that "manifest necessity" and "the ends of public justice" remain the tests in determining whether such discretion is properly exercised. United States v. Perez, 22 U.S. 579, (1824); Gori v. United States, 282 F.2d 43 (2d Cir.), 367 U.S. 364 (1961); Illinois v. Somerville, 410 U.S. 458 (1973). In a recent Supreme Court case concerning this question, Mr. Justice Rehnquist stated: "A trial Judge properly exercises his discretion to declare a mistrial if an impartial verdict cannot be reached, or if a verdict of conviction could be reached but would have to be reversed on appeal due to an obvious prosecutorial error in the trial" Illinois v. Somerville, *Supra*, at 464.

This was precisely the determination made by Judge Clarie in his sua sponte declaration of a mistrial after a full and complete hearing concerning the testimony of the witness, Daniel Harris.

1. (continued)

Whitfield v. Warden, 486 F.2d 1118 (4th Cir. 1973), cert. denied, 419 U.S. 876 (1974) (possibility that juror overheard arguments between opposing counsel which would bias him);

United States ex rel. Gibson v. Ziegele, 479 F.2d 773 (3d Cir.), cert. denied, 414 U.S. 1008 (1973) (key witness too ill to testify);

United States v. Chase, 372 F.2d 453 (4th Cir.), cert. denied, 387 U.S. 907 (1967) (juror read prejudicial newspaper articles);

Crawford v. United States, 285 F.2d 661 (D.C. Cir. 1960) (jury exhibited confusion as to what it actually had decided);

Himmelfarb v. United States, 175 F.2d 924 (9th Cir.), cert. denied, 338 U.S. 860 (1949) (district attorney referred to another criminal case pending against defendant in jury's presence);

United States v. Potash, 118 F.2d 54 (2d Cir.), cert. denied, 313 U.S. 584 (1941) (juror became too ill to continue deliberations);

Conner v. Deramus, 374 F. Supp. 504 (M.D. Pa. 1974) (witness made prejudicial remarks during trial).

A-91.

Judge Clarie determined that the defendant could not receive a fair and impartial trial before the impaneled jury. Under all the circumstances, Mr. Harris' testimony could be labeled as prejudicial, and it has been specifically held that prejudicial remarks by a witness during the course of a trial may be remedied by the Court's exercise of discretion in declaring a mistrial. Conner v. Deraamus, Supra.

In his memorandum, the defendant concludes that "it cannot fairly be said that the mistrial was granted for the benefit of defendant Grasso" and that "the true beneficiaries were Daniel Harris on the one hand and the Government on the other". The ruling of Judge Clarie is clear in showing that the Court was acting solely to insure that the defendant had a fair and impartial trial, and that the guilt or innocence of the defendant on the tax evasion charges would not be subordinated in the jury's deliberations to the bizarre circumstances which arose after the witness had testified. Judge Clarie specifically stated that there was no improper conduct on the part of the prosecutors or Government agents or investigators, and that the Government had no knowledge that Mr. Harris was not testifying truthfully when called as a witness by the Government. (Transcript of Proceedings of November 26, 1975, p.12). The Government contends that Harris did testify truthfully on the witness stand and that his recantation to the defense was not true, as Harris subsequently told federal agents.

The trial Court's declaration of a mistrial in this case was obviously in the sole interest of the defendant. In a case where the presiding Judge, on his own Motion and with neither approval nor objection by the defendant, declared a mistrial, the United States Supreme Court, in upholding the Government's right and duty to retry the defendant stated:

"Where, for reasons deemed compelling by the trial Judge, who is best situated intelligently to make such decision, the ends of substantial justice cannot be attained without discontinuing the trial, a mistrial may be declared without the defendant's consent and even over his objection, and he may be retried consistently with the Fifth Amendment. . . .

A-92.

Suffice that we are unwilling, where it clearly appears that a mistrial has been granted in the sole interest of the defendant, to hold that its necessary consequence is to bar all retrial." Cori v. United States, 367 U.S. 364, 368, 369 (1961).

There is no question of improper conduct by the Government to be decided based upon this Motion, since Judge Clarie specifically found that there was no Government misconduct. McNeal v. Hallowell, 481 F.2d 1146 (5th Cir. 1972) cited by the defense, presents an entirely different factual situation than that which occurred in this case. In McNeal, the prosecution had two witnesses, one of whom told a different story on the witness stand and the second of whom took the Fifth Amendment unexpectedly. The Court of Appeals for the 5th Circuit applied the rules stated in Illinois v. Somerville and found that the question of whether an impartial verdict could be reached was clearly not an issue in that case. Factually the Court's action in McNeal was strictly for the benefit of the prosecution, which simply could not make out its case, and thus had a second opportunity to improve its case and re prosecute the defendant. Such is not the case here. There is not the slightest indication in this case that Judge Clarie's declaration of a mistrial was in any conceivable way intended to grant the Government a second chance to try the defendant because of the Government's inability to make out its case. In his memorandum, the defendant states that there was "no justification at such a late stage in the trial, for taking away the defendant's opportunity for a favorable verdict". Of course, defendant's right to have his trial completed by a particular tribunal is important, but not absolute. In this case, the defendant moved for dismissal of the indictment, thus seeking not to have the trial completed before the impaneled jury. It can thus be argued that the defendant prompted the trial Court to declare a mistrial. At no time during the proceedings did the defendant express a desire to have his trial completed before the impaneled jury.

A-93.

It has recently been held that even where a mistrial was erroneously declared by the trial Court, sua sponte, retrial of a defendant is not barred by the double jeopardy clause of the Fifth Amendment where there was no abuse of judicial discretion. The Court stated:

"Weighing, as we must, the competing interest of the defendant in having 'his trial completed by a particular tribunal . . . [and] the public's interest in fair trials designed to end in just judgments', we have concluded that in this instance the contention of double jeopardy must be rejected. The trial Judge's ruling can scarcely be characterized as 'erratic' or made in circumstances disclosing a plain lack of discretion, as his decision was arrived at only after the defendant had vigorously urged a violation of the Brady principle. Moreover, while the defendant did not expressly consent to a mistrial-preferred the more drastic remedy of dismissal - at no time did his counsel draw to the attention of the Court 'the importance to the defendant of being able, once and for all, to conclude his confrontation with society through the verdict of a tribunal he might believe to be favorably disposed to his fate' (Cite omitted). In fact, his attitude was such that it was not until filing his answering brief on appeal that he set any store upon a 'valued right' to completion of the trial by the first jury."

United States v. Sedgwick, - A.2d -, 18 Crim. L. Rep.2124 (D.C. Ct. App., Sept. 30, 1975).

CONCLUSION

Under the conditions presented during the course of this trial, there was no abuse of discretion by the trial Court in ordering a mistrial on the basis of manifest necessity, the Court having found that the ends of public justice would be defeated in allowing the case to go to the jury. The Court acted to preclude any actual prejudice to the defendant, after an unforeseeable circumstance arising during the trial had caused the Court to properly exercise its discretion in terminating the trial. The Government believes that the defendant may be retried without being placed in double jeopardy in violation of his constitutional rights.

Based on all of the above reasons, the Government, therefore,

A-94.

urges that Defendant's Motion To Dismiss Indictment On Grounds
Of Double Jeopardy be denied.

Respectfully submitted,

PETER C. DORSEY
UNITED STATES ATTORNEY

Michael Hartmere
BY: MICHAEL HARTMERE,
ASSISTANT UNITED STATES ATTORNEY

DAVID H. BEITZ,
TRIAL ATTORNEY
DEPARTMENT OF JUSTICE

CERTIFICATION

This is to certify that a copy of the within and foregoing
was mailed this *14th* day of January, 1976 to Henry Rothblatt,
Esquire, 232 West End Avenue, New York, New York 10023.

Michael Hartmere
MICHAEL HARTMERE
ASSISTANT UNITED STATES ATTORNEY

A-95.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA, :
 :
 v. :
 : CRIMINAL NO. H-75-52
 SYLVIO J. GRASSO, :
 :
 Defendant. :

REPLY MEMORANDUM IN SUPPORT OF
DEFENDANT'S MOTION TO DISMISS
INDICTMENT ON GROUNDS OF DOUBLE
JEOPARDY

Preliminary Statement

The purpose of this memorandum is to briefly respond to certain points raised by the government in opposition to the within motion.

Also submitted herewith and annexed hereto is a transcript of the taped recorded conversation between the government witness Daniel Harris and Henry Rothblatt.

Argument

I. The Defendant Has Not Waived The Defense of Double Jeopardy.

Despite the government's apparent suggestion that the defendant did not oppose the mistrial (Gov't Mem. at 2), or expressly assert "a desire to have his trial completed before the impaneled jury" (Gov't Mem. at 6), it is quite clear that there has been no waiver of double jeopardy. For the mistrial was declared sua sponte; the defendant neither requested nor consented

RECEIVED

JAN 20 1976
U. S. ATTORNEY'S OFFICE
HARTFORD, CONNECTICUT

A-96.

RECEIVED

JAN 20 1976
U. S. ATTORNEY'S OFFICE
HARTFORD, CONNECTICUT

to it. That is sufficient to preserve the issue. See e.g., United States v. Jorn, 400 U.S. 470, 484-485 (1971). 1/

The government is apparently also suggesting some form of waiver by virtue of defendant's motion for dismissal of the indictment on the ground of prosecutorial misconduct. (Gov't Mem. at 6). But certainly this remedy is quite different from a mistrial, and no degree of acquiescence in the Court's ruling can be implied therefrom.

II. It Is Not Necessary to Establish Prosecutorial Misconduct In Order For Defendant To Prevail On This Motion.

While we do believe there is substantial evidence of misconduct of federal agents concerning the witness Daniel Harris,^{2/} it is not necessary for the defendant to establish that such misconduct caused the mistrial. This would be true only if the mistrial had been granted upon defense motion. See United States v. Jorn, *supra*, at 485 n.12.

III. The Defendant Did Not Cause or Benefit From The Mistrial

In analyzing the Supreme Court's decision in United States v. Jorn, *supra*, the Court of Appeals recently wrote:

The thrust of the opinion is that where the mistrial is not motivated for the benefit of the defendant, and the defendant has done nothing himself to create the problem, he is entitled to double jeopardy protection. . . . [T]he prime consideration is the action of the trial judge as it affects the defendant.

United States v. Glover, 506 F.2d 291, 297 (2d Cir. 1974).

1/ Indeed, Judge Clarie's remarks following his declaration of a mistrial indicated that argument concerning double jeopardy was to be deferred until a later date:

The Court is firmly of the opinion that a mistrial should be granted. And the Government can decide whether or not at any future time they wish to proceed further with the prosecution. At that time the issue of double jeopardy could be argued, and can move in proper form at that time.

That is the ruling of the Court.

(Transcript of Proceeding of November 26, 1976 at 14).

2/ We have annexed hereto a transcript of the tape recording in which Daniel Harris recanted his trial testimony and discussed the manner in which he was pressured in testifying at trial.

-2-
A-97.

It is not surprising then, that the government disputes our contention that the mistrial benefited the witness Harris and the prosecution, and was to the substantial detriment of the defendant. But upon analysis, this clearly was the effect.

First, we respectfully submit that Judge Clarie's statement as to the reason he was declaring a mistrial is not determinative.

At the outset, we put aside the trial judge's statement that his sole intent was to protect the interests of the defendants. Although a trial judge's beneficent motive was considered significant in Gori v. United States, 367 U.S. 364, 81 S.Ct. 1523, 6 L.Ed. 2d 901 (1961), it now can be accorded little or no weight. United States v. Jorn, 400 U.S. 470, 483, 91 S.Ct. 547, 27 L.Ed. 2d 543 (1971).

Whitfield v. Warden of Maryland House of Correction, 486 F.2d 1118, 1123 (4th Cir. 1973).

Secondly, while the precise cause of the mistrial is perhaps a debatable question, it is clear that defendant Grasso did "nothing himself to create the problem." United States v. Glover, *supra*.

It can certainly be argued that the government caused the mistrial by calling Daniel Harris as a witness when it was known he was extremely reluctant to testify, and had in fact just told his assigned lawyer that his proposed testimony was false. Rather than calling this to the Court's attention, the government, according to Harris, threatened him with perjury and revocation of his parole if he did not testify (See transcript of Tape Recording at 17-25; 29-31).^{3/}

In his decision declaring the mistrial, Judge Clarie seemed particularly concerned about the prejudicial effect of further

^{3/} In United States v. Glover, *supra*, where a Bruton problem caused a mistrial, the Court noted:

It will be worth this possible sacrifice of public justice in the case of Glover if this decision alerts Prosecutors to enlist the willing aid of trial courts fully to explore Bruton problems before the jury comes into the box.

506 F.2d at 299. (emphasis in original).

testimony concerning narcotics. Yet here again it was the government, not the defendant, who first introduced such testimony. Moreover, the most important part of this additional evidence--the tape recorded recantation of Harris--would hardly have prejudiced the defendant.

It might be argued that the actual cause of the mistrial was Daniel Harris's refusal to testify on Fifth Amendment grounds following his recantation. But certainly this difficulty was for the benefit of Harris, not the defendant. Moreover, as indicated in our initial memorandum, it seems doubtful that the Fifth Amendment was properly invoked, and even if it had been, several alternatives to a mistrial were left unexplored. (See Defendant's Mem. at 6-7). A somewhat similar situation, in which a mistrial was declared sua sponte in order to protect the Fifth Amendment rights of government witnesses, was specifically held not to be a "manifest necessity" in United States v. Jorn, 400 U.S. 470, 486-487 (1971).

Finally, as indicated in our initial memorandum, if we look prospectively at the effect of the mistrial, it is undeniable that while the government can only benefit by a fresh opportunity to prosecute the defendant (either with or without Daniel Harris), a retrial will severely prejudice the defendant in terms of his inability to finance another trial, and possible impeachment through use of his prior testimony.

IV. The Issue Presented By This Motion Is Not Whether The Trial Court Abused Its Discretion, But Whether The Sua Sponte Declaration Of A Mistrial Was A Manifest Necessity.

The government cites United States v. Sedgwick, 345 A.2d 464, 18 Cr.L.Rep. 2124 (D.C.Ct.App. Sept. 30, 1975), for the proposition that "even where a mistrial was erroneously declared by the trial Court, sua sponte, retrial of a defendant is not barred by the double jeopardy clause of the Fifth Amendment where there was no abuse of judicial discretion." (Gov't. Mem. at 7)

(emphasis in original).

The controlling authority appears to be precisely the contrary:

It would be stultifying to treat this appeal as involving "abuse of discretion." We do not cast the issue in those terms. In this case, the court below did not act erratically as the judges in some other cases cited may have. As Mr. Justice White pointed out in his dissent in Somerville, supra, the cases of Downum and Jorn "made it quite clear that the discretion of the trial court to declare mistrials is reviewable and that the defendant's right to a verdict by his first jury is not to be overridden except for 'manifest necessity.'" 410 U.S. at 474, 93 S.Ct. at 1075.

United States v. Glover, 506 F.2d 291, 299 n.15 (2d Cir. 1974).

This is particularly true in the present case, where Judge Clarie, in declaring the mistrial, noted the double jeopardy problem raised thereby and specifically left its resolution to such future time as the government might move the case for retrial.

(See p.2 n.1, supra)

Conclusion

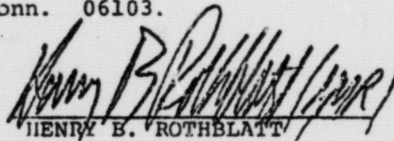
For the foregoing reasons, and those set forth in defendant's initial memorandum, the indictment herein should be dismissed.

Respectfully submitted,

HENRY B. ROTHBLATT
Attorney for Defendant
232 West End Avenue
New York, New York 10023
(212) 787-7001

CERTIFICATE OF SERVICE

This is to certify that a copy of the within and foregoing Reply Memorandum in Support of Defendant's Motion To Dismiss Indictment on Grounds of Double Jeopardy has this 26th day of January, 1976, been deposited, postage paid, in the United States mail, addressed to Peter C. Dorsey, Esq., United States Attorney, 450 Main Street, Hartford, Conn. 06103.


HENRY B. ROTHBLATT

A-101.

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA :

V. :

CRIMINAL NO.: H-75-52

SYLVIO J. GRASSO :

GOVERNMENT'S SUPPLEMENTAL MEMORANDUM IN OPPOSITION
TO DEFENDANT'S MOTION TO DISMISS INDICTMENT
ON GROUNDS OF DOUBLE JEOPARDY

It is clear from the briefs, and after oral argument on the above Motion, that the mistrial declared by the trial Court in this case was not for the benefit of the Government, and that there was no prosecutorial or Government misconduct which resulted in the situation which brought about the mistrial. The only argument propounded by the defendant in his briefs and oral argument is that the declaration of a mistrial in this case represented an abuse of the discretion of the trial Court. However, under the law previously cited in the Government's brief, it is clear that Judge Clarie was well within the breadth of discretion entrusted to him as trial Judge in his declaration of a mistrial in this case. United States v. Beckerman, 516 F.2d 105 (2d Cir. 1975).

The Government strongly suggests that the actions of the defendant prior to the declaration of a mistrial should be considered by this Court in its decision on Defendant's Motion. The Government contends that there was an implied consent by the defendant to the declaration of a mistrial in this case. It was the defendant who insisted on a hearing concerning Government misconduct. It was only after this hearing that the trial Court sua sponte declared a mistrial. The law is clear that consent need not be express, but may be implied from the totality of circumstances attendant when a declaration of mistrial. United States v. Goldstein, 479 F.2d 1061, 1067 (2d Cir. 1973). While reaffirming the principles enunciated in Gori v. United States and Illinois v. Somerville (Citations omitted), the Court of Appeals for the Second Circuit has demonstrated that it will carefully scrutinize the conduct of the defendant which may have

A-102.

led to the declaration of a mistrial. United States v. Gentile, 525 F.2d 252 (2d Cir. 1975). In Gentile, Judge Friendly stated "While La Ponzina's counsel may not have consented to the declaration of a mistrial, he had heavily contributed to it. His intervention at the initial conference at side bar had served to stimulate the Judge's concern." United States v. Gentile, Supra at 255.

Additionally, the Government has recently come into possession of information, not previously made known to the Court, which the Government believes bears upon the defendant's conduct prior to the declaration of a mistrial and upon the defendant's implied consent to the declaration of a mistrial. This new information resulted from a Government investigation involving the alleged threats to the witness Daniel Harris leading to his recantation to the defense. Pursuant to this investigation, Attorney Rothblatt's office voluntarily turned over to the Government investigators memoranda of interviews of one Joseph Rose and Daniel Harris conducted by one Ronald Goldfarb, a Law Clerk at Attorney Rothblatt's office. These memoranda are attached hereto as Government's Exhibit "A". Rose was interviewed by Mr. Goldfarb on September 9, 1975, while Harris was interviewed by Mr. Goldfarb on September 10, 1975, in both cases well before trial commenced. Mr. Goldfarb's memoranda allege that Harris told Mr. Goldfarb that he had lied to Government agents concerning the defendant's activities in narcotics (Exhibit A, Page 3), and that Mr. Rose informed Mr. Goldfarb that he thought Harris would sign a contradictory statement after his parole hearing scheduled for September, 1975 (Exhibit A, Page 1).

Thus, the fact of a contradiction in stories by Harris, as demonstrated by the tape-recording of November 20, 1975 (which led to the declaration of the mistrial), was known to the defendant since these memoranda were in existence from and after approximately September 10, 1975. And while the tape-recording did not exist until November 20, the memoranda of Mr. Goldfarb clearly represented a contention, at least on his part, that as of September 10,

A-103.

Harris had stated a position contrary to his trial testimony. Thus, the fact of the contradictory statement of Harris, quite opposed to being made known late in the trial as a result of any Government misconduct, was indeed the result of a failure to disclose that which defendant's counsel knew or should have known from and after September 10, 1975.

The Government contends that the mistrial declared in this case on November 26, 1975, was the direct result of the determinations of the defense as to when to produce the contradictory statement of Mr. Harris. Clearly, the alleged statements of Mr. Harris to Mr. Goldfarb as evidenced by Mr. Goldfarb's memoranda, were inconsistent with Mr. Harris' trial testimony. It now appears that the defense chose not to contradict Mr. Harris with his prior inconsistent statements, but rather waited until the trial was nearing completion to move by dismissal based on an inconsistent statement (the tape-recording) of Mr. Harris.

The Government here strongly suggests that the conduct of the defense should be carefully considered by this Court in its determination as to whether the defendant would be subjected to double jeopardy in any new trial.

Respectfully submitted,

PETER C. DORSEY
UNITED STATES ATTORNEY

BY:

Michael Hartmere
MICHAEL HARTMERE
ASSISTANT UNITED STATES ATTORNEY

C E R T I F I C A T I O N

This is to certify that a copy of the within and foregoing Supplemental Memorandum was mailed this 23rd day of February, 1976 to: Henry B. Rothblatt, Esquire, 232 West End Avenue, New York, New York, 10023.

Michael Hartmere
MICHAEL HARTMERE
ASSISTANT UNITED STATES ATTORNEY

A-104.

TO: File
From: RCG
Re: Grasso investigation

Joseph Rose interviewed at Connecticut Correctional Institute at Enfield on Sept. 9, 1975 from 12:25P.M. to 12:40P.M.

Mr. Rose was very cooperative and anxious to speak to me. He had tried but was unable to contact Grasso the previous weekend when he was out on furlough.

He said that Danny Harris had been contacted by unknown "government men" six to seven weeks previous concerning Grasso. They were interested in the amount of premium that Grasso was charging on bail bonds. Rose did not know what Harris responded. The agents promised Harris favorable letters to the parole board if he "cooperated." Rose also said that Harris had had three previous visits from agents. Rose has not been contacted.

Rose thought that Harris would sign a statement after his parole hearing scheduled for the end of September.

I asked Rose about Willie Peay; he didn't know if he had been contacted.

Rose said that the reason Harris had offered to testify against Grasso in the Boston trial (he didn't actually testify) was that Harris thought that Grasso had prejudiced a judge against him.

A-105

Daniel Harris interviewed at Connecticut Correctional Institute at Enfiel on September 10, 1975 from 12:05P.M. to 12:45P.M.

Harris said that he was visited in June by an assistant U.S. Attorney and two Treasury Department agents. They showed him identification but he was unable to recall their names. The U.S. Attorney was described as follows: White, short, clean shaven, late thirties.

They told Harris that they wanted to "get Grasso." They said, "He got away from us in Boston." They asked how many times Grasso had posted bond for him. "Five." Asked how much premium Grasso charged. "Ten percent." They told Harris that the maximum rate for a bond in excess of \$5,000 was seven percent. (Grasso had posted three ten thousand dollar bonds for Harris)

They asked about a 1968 Cadillac Sedan deVille that Harris had sold to Grasso in 1970. Grasso paid \$2200 cash plus the premium on a \$10,000 bond. (\$1,000). They asked if Grasso had ever threatened him and if he had heard of the rumors to that effect. "Heard of rumors, not true."

The U.S. Attorney promised letters to parole board if Harris would testify against Grasso at a Grand Jury hearing. They told him that they had spoken to Willie Peay and he had given them "good information."

They took Harris to a courtroom on Main Street in Hartford. They told him it was a Grand Jury investigating

A-106.

Grasso. Harris was questioned under oath. He was asked to confirm a statement that he had given to Connecticut detectives in 1971. (See below) They also asked if Grasso dealt in narcotics. "Yes." (Harris admits that this was a lie)

In 1971 Harris was questioned by State vice detectives O'Brien and Donofrio and county detective Reynolds. (Why does Harris remember their names when he seems so confused about more recent events.) They said that they were investigating Grasso and wanted to know of all of Harris' dealings with him. He told them that the narcotics that he (Harris) was caught with belonged to Grasso. Harris said that he lied in hopes of having his own (8-30) sentence reduced and to get even with Grasso who he thought was responsible for sentence. (Harris said that he was told by his former attorney, Albert Murphy, that Grasso had persuaded the judge to allow him to withdraw his guilty plea to a bail jumping charge and that was part of the reason for him receiving a severe sentence.)

The same two treasury agents had questioned Harris in 1972.

Before the trial in Boston, F. Mac Buckley promised letters to parole board. He said, "We want to get him (Grasso)."

A-107.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA :
v. :
SYLVIO J. GRASSO, : CRIMINAL NO. H-75-52
Defendant. :

SUPPLEMENTAL REPLY MEMORANDUM IN SUPPORT OF
DISMISSAL OF INDICTMENT ON GROUNDS OF DOUBLE
JEOPARDY.

One can hardly quarrel with the suggestion, as a general principle, that "the actions of the defendant prior to the declaration of a mistrial should be considered by this Court in its decision on Defendant's motion." (Government's Supplemental Memorandum, p. 1). However, applied to this case, there is absolutely no basis for concluding, as the government further suggests, that defendant Grasso either consented to or caused the mistrial declared by Judge Clarie on November 26, 1975.

The government seeks support from United States v. Gentile, 525 F.2d 252 (2d Cir. 1975). The present case is distinguishable on virtually every key point.

In Gentile, counsel for one of two co-defendants on trial moved for a mistrial following improper and prejudicial comments by the prosecutor in his opening. When counsel for the other defendant argued in support of the motion, but later refused to join in it because he did not wish to waive a claim of double jeopardy, the trial judge stated:

As long as you want to play with me, I will do it my way. It is an implied consent on your part and a motion by the defendant that there would be prejudice to both defendants, because they are both involved in the same manner and on the same tapes.

525 F.2d at 254-55. The Court of Appeals sustained this finding,

A-108.

and, after noting that the mistrial was declared "in the sole interest of the defendant[s]," that at least one defendant had clearly asked for it, that no evidence had yet been presented and no delay would ensue, and that there was no basis for arguing that the defendant would have fared better at the hands of the first jury, rejected the double jeopardy claim. 525 F.2d at 258.

In the present case, the mistrial was clearly not solely in the interest of the defendant; it is our contention that he did not benefit from it at all. Moreover, the defendant at no time moved for a mistrial or argued in support of such relief. He requested dismissal of the indictment on grounds of prosecutorial misconduct. When the Court declared a mistrial sua sponte, the defendant noted his disagreement with that ruling.

Furthermore, here the mistrial was declared on the final day of a lengthy, complex and costly tax evasion trial, rather than immediately after the government's opening as in Gentile. And finally, as indicated in the papers previously filed herein, there are several reasons why it was in Mr. Grasso's interest to have the first trial proceed to verdict, rather than be subjected to a second trial before another jury.

The government further suggests that the defendant deliberately caused the mistrial by intentionally withholding prior inconsistent statements of Daniel Harris. As indicated in the annexed affidavit of Henry Rothblatt, there is no factual basis for this bizarre argument. Moreover, if anything, the fact that Harris so readily disclosed the falsity of his statements to individuals associated with the defense on two separate occasions, only renders the government's claim that Harris never made such a disclosure to it most questionable, and supports the claim made by Harris himself that he was coerced into testifying. Otherwise,

under the circumstances of this case, the statements which Harris made in September are simply not relevant to the instant case.

Respectfully submitted,

HENRY B. ROTBLATT
Attorney for Defendant
232 West End Avenue
New York, New York 10023
(212) 787-7001

A-110.

CERTIFICATE OF SERVICE

This is to certify that copies of the within and foregoing Supplemental Reply Memorandum in Support of Dismissal of Indictment of Ground of Double Jeopardy and Affidavit of Henry B. Rothblatt have this 1st day of March, 1976 been deposited, postage pre-paid, in the United States mail addressed to Peter C. Dorsey, Esq., United States Attorney, 450 Main Street, Hartford, Conn. 06103.

HENRY B. ROTHBLATT

A-111.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA :

v. :

AFFIDAVIT

SYLVIO J. GRASSO, :
Defendant :

CRIMINAL NO. H-75-52

:

HENRY B. ROTHBLATT, being duly sworn, deposes and says:

1. I am the attorney for defendant SYLVIO J. GRASSO and represented him at the trial of this matter. I submit this affidavit in order to relate facts concerning the internal memorandum of my office which the government has recently submitted to the Court as an exhibit to its supplemental memorandum of law in opposition to dismissal of the indictment on grounds of double jeopardy.

2. Following Judge Clarie's declaration of a mistrial the government apparently undertook an investigation of the circumstances surrounding the recantation of Daniel Harris. Pursuant to this investigation, defendant Grasso was interviewed by two federal agents at my office in New York City.

3. During this interview I informed the agents that Daniel Harris had told a member of my staff on September 10, 1975, that his statements regarding Mr. Grasso's alleged dealings in narcotics were untrue. I further informed the agents that a memorandum to this effect had been prepared, and at the agents' request, furnished them with a copy. These disclosures were made in order to negative any suggestion that Harris's recantation during the trial was the result of pressure put upon him following

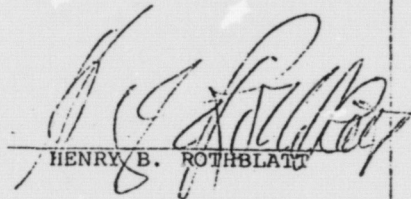
A-112.

his testimony as a government witness by or at the behest of Mr. Grasso.

4. At the time my staff member, Mr. Ronald Goldfarb, interviewed Harris and several other inmates incarcerated in the Hartford area, we were not aware that Harris was going to be a witness in this case. The interviews were not conducted in preparation for this case, but for Sylvio Crasso v. Peter Gruden, et al. (Civil No. H-74-194), a civil rights action presently pending in this Court in which we also represent Mr. Grasso.

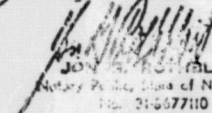
5. When Daniel Harris testified as a government witness at the trial I assumed that he was among the inmates that had refused to talk to Mr. Goldfarb in September. It was not until I returned to my office in New York, subsequent to the entire episode with Harris at the Seelys Street Jail, that I became aware of the memorandum prepared by Mr. Goldfarb, and the fact that Harris had spoken to Mr. Goldfarb and indicated that his statements concerning narcotics dealing with Mr. Grasso were untrue.

6. Thus the government's speculation that I deliberately withheld the contradictory statements during cross-examination of Harris is incorrect. I was simply not aware of the statements at that time. I can only add that in over 35 years as an active trial practitioner I have never undertaken, and would certainly never recommend, the reckless trial strategy suggested by the government.


HENRY B. ROTHBLATT

Sworn to before me this

26th day of February, 1976.


JOHN W. ROTHBLATT
Notary Public, State of New York
No. 31-6677110
Qualified in New York County
Commission Expires March 30, 1976

A-114.

United States Court of Appeals
FOR THE SECOND CIRCUIT

No. 76-1284

UNITED STATES OF AMERICA
Appellant

v,

SYLVIO J. GRASSO
Appellee

AFFIDAVIT OF SERVICE BY MAIL

Albert Sensale, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 914 Brooklyn Ave Brooklyn, N.Y.

That on the 27th day of August, 1976, deponent served the within Brief and Appendix for Appellant upon Henry Rothblatt, Esq., 232 West End Ave, New York, N.Y. 10023 Frank S. Berall, Esq., 60 Washington St., Hartford, Connecticut, 06106

Attorney(s) for the Appellee in the action, the address designated by said attorney(s) for the purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in a post office official depository under the exclusive care and custody of the United States Post Office department within the State of New York.

Sworn to before me,

This 27th day of August 1976

SHIRLEY AMAKER
Notary Public, State of New York
No. 24-4502768
Qualified in Kings County
Commission Expires March 30, 1977

